EDITOR'S NOTE

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No. 84-1279-CSY
Status: GRANTED

Docketed:
February 7, 1985

Title: Delaware, Petitioner
v.
Robert E. Van Arsdall

Court: Supreme Court of Delaware

Counsel for petitioner: Myers, Gary A., Fairbanks Jr., Richard E.

Counsel for respondent: Nicholas, William N., Williams, John

Entry	Date	Note	Proceedings and Orders
1	Feb 7 1985	G	Petition for writ of certiorari filed.
2	Mar 11 1985		Brief of respondent Robert E. Van Arsdall in opposition filed.
3	Mar 11 1985	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	Mar 13 1985		DISTRIBUTED. March 29, 1985
5	Mar 18 1985	X	Reply brief of petitioner Delaware filed.
6	Jun 21 1985		REDISTRIBUTED. June 27, 1985
8	Jun 28 1985		REDISTRIBUTED. July 2, 1985
9	Jul 2 1985		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	Jul 2 1985		Petition GRANTED.
			**********
12	Aug 6 1985		Order extending time to file brief of petitioner on the merits until September 6, 1985.
13	Sep 6 1985		Joint appendix filed.
14	Sep 6 1985		Brief of petitioner Delaware filed.
15	Aug 24 1985		Record filed.
16	Sep 9 1985		Brief amicus curiae of United States filed.
17	Sep 20 1985	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Sep 17 1985		Order extending time to file brief of respondent on the merits until November 8, 1985.
20	Oct 15 1985		Motion of the Acting Solicitor General for leave to participate in GRANTED.
21	Oct 28 1985	D	Motion of respondent for divided argument filed.
22	Nov 12 1985		Motion of respondent for divided argument DENIED.
23	Nov 8 1985		Brief of respondent Robert E. Van Arsdall filed.
24	Nov 19 1985		CIRCULATED.
25	Nov 21 1985		SET FOR ARGUMENT, Wednesday, January 22, 1986. (1st case).
26	Jan 10 1986	X	Reply brief of petitioner Delaware filed.

84-1279

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF DELAWARE,

Petitioner,

v.

ROBERT E. VAN ARSDALL,

Respondent

On Petition for Writ of Certiorari to the Supreme Court of Delaware

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Under the Confrontation Clause, when a prosecution witness relates facts which the defendant has conceded, does an erroneous restriction of the defendant's cross-examination of that witness require reversal without consideration of the harmlessness of the error?[1]

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1. The principal parties in the Delaware Supreme Court were the STATE OF DELAWARE, Petitioner, and ROBERT E. VAN ARSDALL, Respondent. Additionally, the Delaware Supreme Court permitted the GANNETT COMPANY, INC., publisher of the Wilmington, Delaware newspapers *The Morning News* and *The Evening Journal*, to intervene as a party. Because the issue in which GANNETT was interested, the trial court's refusal to grant the defendant's request to close the pretrial proceedings, was not resolved by the Delaware Supreme Court and is not presented by this petition, GANNETT has not been named as a party in this Court.

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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF DELAWARE,

Petitioner,

v.

ROBERT E. VAN ARSDALL,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Delaware

The State of Delaware, petitioner, requests that a writ of certiorari issue to review the judgment and opinion of the Delaware Supreme Court entered November 19, 1984.

Opinion Below

The opinion of the Supreme Court of Delaware dated November 19, 1984 is not yet reported. It is reproduced in the Appendix to this Petition beginning at A-1.

Jurisdictional Grounds

The judgment of the Delaware Supreme Court, reversing Van Arsdall's murder and possession of a deadly

weapon convictions, was entered on November 19, 1984.[2] A timely motion for a rehearing before the Delaware Supreme Court, sitting *en banc*, was denied December 12, 1984. App. at B-1. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). Although the judgment below vacated the convictions and remanded for a new trial, the judgment is final for purposes of review by this Court because Delaware law would preclude, in the event of an acquittal upon retrial, a subsequent prosecution appeal of the federal issue now presented. *Florida v. Meyers*, ___U.S. ___, 104 S.Ct. 1852, 1853 n. * (1984) (per curiam); *California v. Stewart*, 384 U.S. 436, 497, 498 n. 71 (1966) (decided with *Miranda v. Arizona*).

CONSTITUTIONAL PROVISION INVOLVED

1. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

2. Although not directly involved in the question presented, the following provisions of the Delaware code were involved in the prosecution and are reproduced in the Appendix at C-1. 11 Del. C. §§271(2)(b), 636(a)(1), 1447 (1979); 21 Del. C. §4149 (1981).

STATEMENT OF THE CASE

A jury found Robert A. Van Arsdall guilty of murdering Doris Epps in the apartment of his friend, Daniel Pregent, in the early morning hours of January 1, 1982.[3]

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2. Delaware appellate practice does not provide for any separate document known as a judgment. Rather the clerk enters a docket notation based on the final paragraph of the written opinion.

3. 11 Del. C. §636(a)(1) (1979) [App. C-1]. Van Arsdall was also convicted of possessing a deadly weapon, a knife, during the murder. 11 Del. C. §1447 (1979) [App. C-1]. The position of the prosecution was that Van Arsdall either singly, or jointly with Pregent, killed Epps. 11 Del. C. §271(2)(b) (1979) (accomplice liability) [App. C-1].

4. Citations to the trial transcript (Tr.) will be by volume and page number, followed by the witness' name. The prosecution's trial exhibits shall be cited as "S. Exh."

On appeal, the Delaware Supreme Court determined that the trial court had impermissibly, under the Confrontation Clause, restricted the defense's cross examination of a prosecution witness, Robert Fleetwood. Refusing to make any inquiry concerning whether Fleetwood's testimony was a crucial part of the prosecution or merely echoed facts conceded by the defense, the Delaware court then reversed the convictions, holding that the Confrontation Clause error could never be found harmless. The question presented by this petition is whether the Clause requires such a rule of automatic reversal.

1. The Killing

Pregent and Fleetwood lived across the hall from each other in a small apartment house in Smyrna, Delaware.[4] On December 31, 1981, they held an informal New Year's Eve party, with people mingling in their apartments all during the day. In the early afternoon, Doris Epps appeared, inquiring about renting Fleetwood's soon to be vacated apartment. Epps returned later and joined the party. At about the same time, Van Arsdall, an acquaintance of both Pregent and Fleetwood, arrived at the party, accompanied by several friends. He remained for a short time and then left. Tr. II91-94, 100-01 (Crain); III41-47 (Fleetwood); IV10-12 (Meinier).

As the party continued into the evening, it lost much of its jovial nature. Pregent quarreled with one female guest and several items were broken in Fleetwood's apartment. Tr. II95, 108-09 (Crain); III62-63 (Fleetwood); IV54 (Meinier). By 10:30 p.m., Epps had passed out, and Pregent, assisted by Robert Crain, carried her into Pregent's sparsely furnished apartment and laid her on a

convertible sofa-bed in the living room. Soon afterwards, Fleetwood "closed" the party, ordering everyone except his friends Alice Meinier and Mark Mood to leave his apartment. After the others had left, the three continued drinking in Fleetwood's apartment. Tr. III48-49 (Fleetwood); IV56 (Meinier).

Sometime after 11:00 p.m., Fleetwood walked across the hall, and momentarily peeking his head in the doorway to Pregent's apartment, saw Van Arsdall sitting on the corner of the sofa-bed. Pregent's feet, hanging over the side of the bed, were visible next to him. Tr. III50-52 (Fleetwood). At 11:53 p.m., with Fleetwood falling asleep, Menier walked across the hallway and looked at the clock in Pregent's kitchen. The living room was dark. Tr. IV14 (Meinier).

About one hour later, with Fleetwood still asleep, Meinier heard a knock at Fleetwood's door. When she opened the door, there stood Van Arsdall holding a bloody knife, his shirt splattered and his hands covered with blood. Tr. IV17-21 (Meinier).[5] Van Arsdall muttered that "he had gotten in a fight" but that "I got them back." Tr. IV19-20 (Meinier). Told by Van Arsdall that "there's something wrong across the hall," Meinier looked into Pregent's apartment and saw Epps' body on the kitchen floor.

When the police arrived several minutes later, they found Epps' disemboweled and mutilated body lying on the kitchen floor with the floor and surrounding furnishings splattered with blood and tissue. In the darkened living room, they found Pregent wrapped in a blanket lying on the blood splattered sofa-bed. Tr. IV129-30 (Timmons).

While the police continued their investigation, Van Arsdall remarked that he "didn't think it would go like this." Tr. VII70-72, 77 (Montgomery). Later that morn-

5. Clinging to Van Arsdall's blood covered watch was a piece of human tissue.

ing, in tape-recorded statements, both Van Arsdall and Pregent told the police that Van Arsdall had returned to Pregent's apartment between 11:00 p.m. and midnight and that the two had talked for a while, first in the kitchen and then in the living room, until Pregent fell asleep next to Epps on the sofa-bed. Then Van Arsdall laid down on some cushions which had been placed on the floor near the sofa-bed. S. Exh. 73 at 2, 9-10 (Van Arsdall); 75 at 4-6, 8-9 (Pregent). Van Arsdall denied any knowledge of how the killing occured, indicating he stepped out into the hallway for a breath of fresh air and had discovered Epps' body when he returned to the apartment. S. Exh. 73 at 2, 4, 12-13.[6]

Two days later, Van Arsdall told the police that he had lied in portions in his first statement in order to "cover up" for his friend Pregent. He repeated that he had returned to Pregent's apartment at around 11:30 p.m. and that, with Epps asleep on the sofa-bed, the two had talked in the living room. However, he now said that as he began to fall asleep on the cushions, he had heard noises on the bed and had then awoke to see Pregent dragging Epps towards the kitchen. When he arose to investigate, the smaller Pregent had struck him and had then begun stabbing Epps. As he sought to pull Pregent away, Pregent pushed him into the bloodied kitchen and struck him again. After Pregent washed his hands and returned to the bed, Van Arsdall said he removed the knife from Epps' body and went across the hall. S. Exh. 74.[7]

6. Van Arsdall said that he had met Menier in the hallway and then returned to discover the body, becoming splattered with blood as he tried to feel Epps' pulse. He denied having the knife and said he had lost his watch earlier that evening. Pregent told the police that after talking with Van Arsdall in the living room, he had fallen asleep on the bed and the next thing he remembered was being awakened by the police. S. Exh. 75 at 2, 10.

7. Pregent, in a second statement, continued to maintain that he fell asleep after talking to Van Arsdall and had no knowledge of the killing. S. Exh. 72.

2. The Trial

Van Arsdall was tried first for the murder of Epps. In his opening remarks, before any evidence had been presented, defense counsel framed the issues for the jurors. Emphasizing that Van Arsdall would testify, counsel told the jury that the defense did not dispute that Van Arsdall had returned to Pregent's apartment at 11:30 p.m., that he had been present in the apartment when Epps was killed, and that he had carried a bloody knife into Fleetwood's apartment. Tr. II30, 38, 40-41. Counsel said the defense intended to show that Pregent alone, had, for some unknown reason, killed Epps. Tr. II39-41.

The prosecution's case was composed of three types of evidence. First, several of the party-goers, including Fleetwood and Meinier, and the responding police officers testified concerning the activities at the party, the scene after the killing, and the statements of Van Arsdall. Secondly, without objection,[8] Van Arsdall and Pregent's post-arrest statements were played for consideration by the jury. Finally, the State called a forensic expert, who demonstrated to the jury that based on an analysis of the nature and type of the bloodstains at the crime scene and on Van Arsdall's clothing, that Epps had been originally attacked and stabbed while she was on the sofa-bed; that Van Arsdall had been facing, in standing position, a profusely bleeding arterial wound; and that he had kneeled in a large pool of blood. Tr. VI56-60, 88-94, 100-04, 108-09 (Lee).

Fleetwood testified concerning the New Year's Eve party events and his momentary glimpse of Van Arsdall sitting on the bed next to Pregent's feet. Near the end of

8. Prior to trial, Van Arsdall had filed an unsuccessful motion to suppress his first statement as involuntary and violative of a state prompt arraignment requirement. The supression issue was not pressed on appeal. He never lodged any objection to the admissibility of his second statement. Although Pregent did not testify, Van Arsdall made no objection to the introduction of his statements.

his cross-examination, defense counsel sought to have Fleetwood admit that eight months after the murder, he had been arrested for walking drunk on a highway,[9] and that the charge had been dismissed after he had indicated that he would speak to the prosecutor the next day concerning his recollection of the killing. Tr. III69, 85-86. The trial judge precluded the inquiry. Tr. III88.[10] Similarly, the trial judge disallowed any cross-examination of Fleetwood concerning whether he had been questioned by police about an unrelated homicide occurring after the Epps murder.

As his counsel had indicated, Van Arsdall took the stand and repeated the chronology of events that he had given in his second statement, telling the jury that after his return at around 11:30 p.m., Pregent and he had talked momentarily in the kitchen and then moved into the living room, where as he sat on the corner of the sofa, they had a drink and continued to talk. He then repeated his story that after laying on the cushions he had been awakened to find Pregent stabbing Epps and had unsuccessfully attempted to intervene. Tr. X41-46, 49-57.[11]

In his summation, defense counsel told the jury that the defendant did not dispute that he had returned to Pregent's apartment before midnight, that he had sat on the bed in the living room, and that he had been present while Epps was killed. Rather, the only issue was whether

9. 21 Del. C. §4149 (1981) [App. at C-1]. The offense is a misdemeanor.

10. The trial judge, before ruling, allowed defense counsel to question Fleetwood outside the presence of the jury concerning the arrest and dismissal. Fleetwood said that he would have gone to the prosecutor's office even if the charge had not been dismissed and that his present testimony related the same facts he had told the police the night of the killing.

11. For the first time, Van Arsdall said that Epps and he had had sexual intercourse on the bed while Pregent was out of the room. This trial revelation occurred after a pre-trial fiber and hair analysis disclosed Epps' body and pubic hair on his pants and underclothing.

he had participated in the killing. Tr. XI32-33, 78.[12] The jury found Van Arsdall guilty.[13]

3. The Delaware Supreme Court and the Automatic Reversal Rule

The Delaware Supreme Court reversed. Initially, scrutinizing only the nature of the excluded impeachment evidence, the court held that the trial judge's ruling precluding cross-examination of Fleetwood concerning his misdemeanor arrest violated the Confrontation Clause because it "prevented the jury from considering facts from which it could have drawn inferences about [his] testimonial reliability." App. at A-5.

The Delaware Court then turned to the State's argument that the Confrontation Clause error was harmless beyond a reasonable doubt because Fleetwood's testimony was neither crucial nor devastating. Instead, his evidence was merely cumulative of, and mirrored, what Van Arsdall repeatedly had conceded in his post arrest statements and his trial testimony, i.e., that he had been in Pregent's apartment with Pregent after 11:30 p.m. Brief for Appellee (State of Delaware) at 13-16, *Van Arsdall v. State*, No. 346, 1982 (Del. Nov. 19, 1984).

While not disputing the conclusion that Fleetwood's testimony, in hindsight, was cumulative in nature and hence unimportant, App. at A-6,[14] the Delaware court

12. In his closing argument, defense counsel emphasized that Fleetwood's testimony only proved what Van Arsdall had never denied, that he was in Pregent's apartment before Epps was murdered. Tr. XI42. Indeed, counsel used other portions of Fleetwood's testimony, which indicated that Pregent had earlier in the evening punched a hole in the hall, to support the defense's position that Pregent acted alone. Tr. XI42-43.

13. At a subsequent trial, Pregent was acquitted.

14. The opinion never states that Fleetwood's testimony was crucial to the prosecution or had any damaging effect. Indeed, the nature of the witness' testimony is not considered by the Delaware court when determining whether a Confrontation Clause error has occurred. App. at A-4-A-7.

refused to even consider the prosecution's position. Rather, again focusing on the nature, and not the effect, of the error, the court held that because "the defendant was subjected to a blanket prohibition against exploring potential bias through cross-examination," the trial court's evidentiary ruling was a "*per se* error" under the Confrontation Clause, which automatically required reversal. App. at A-7.[15]

Reasons for Granting the Writ

1. The Automatic Reversal Rule of the Decision Below Conflicts With Decisions of Other Courts of Appeals and State Supreme Courts

In the decision below, the Delaware Supreme Court held, as a matter of federal constitutional law, that an erroneous restriction of the defendant's cross-examination of any prosecution witness can never be held harmless.[16] The opinion is the latest addition to a con-

15. The structure of the Delaware court's opinion clearly indicates that it was attempting to divine the appropriate federal harmless error rule and not crafting a standard under any applicable state rule or statute. First, no reference is made to the Delaware harmless error rule, Del. Super. Ct. Crim. R. 52(a). *See Michigan v. Long*, ___ ---U.S. ____, 103 S. Ct. 3469, 3474-78 (1983). Secondly, the *per se* rule adopted is supported by a reference to an opinion of the District of Columbia Court of Appeals. Finally, the court states that its rule is meant to be "consistent with *Davis v. Alaska*, 415 U.S. 308 (1974)." *Cf. Connecticut v. Johnson*, 460 U.S. 73, 81 n. 9 (plurality opinion), 90-93 (Powell, J., dissenting) (1983) (state court, in an opinion lacking reference to state policy or statute, was applying federal harmless error rule).

16. For the purpose of review by this Court, Delaware will not contest the decision of the court below that the trial court erred when it prevented Van Arsdall from questioning Fleetwood about the prior misdemeanor arrest and subsequent dismissal. However, the past opinions of this Court reflect the ambivalent relationship between the Confrontation Clause's substantive guarantee and the notion of harmless error in a particular prosecution. *Compare Parker v. Randolph*, 442 U.S. 62, 72-73 (1979) (plurality opinion) and *Dutton*

fusing morass of lower court opinions which have sought, often with conflicting results, to chart the scope of appellate remedies in cases involving the Confrontation Clause. After *Davis v. Alaska*, 415 U.S. 308 (1974) underscored that each trial court ruling concerning the scope of cross examination may implicate constitutional values, appellate courts have struggled to determine the appropriate relationship between the Confrontation Clause errors described in *Davis* and the guidelines for harmless error analysis described in *Chapman v. California*, 386 U.S. 18 (1967).

In *Chapman*, this Court rejected the contention "that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful." 386 U.S. at 21-22. Rather, *Chapman* emphasized that a trial error, including one of constitutional magnitude, may be found harmless, so as not to warrant reversal, when the appellate court can say "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24.

Seven years later in *Davis*, this Court held that if the testimony of a witness provides a "crucial link in the proof" of the crime so that "[t]he accuracy and truthfulness of his testimony were key elements in the State's case," *Davis*, 415 U.S. at 317, a trial court may not, consistent with the Confrontation Clause guarantee, prevent the defendant from attempting to impeach the witness by showing possible bias or interest arising from a "relationship" with the prosecution. While emphasizing that in the case before it there was "real possibility" that the excluded impeachment evidence would have done "[s]erious dam-

NOTES *(Continued)*

v. Evans, 400 U.S. 74, 87-88 (1970) (plurality opinion) (no Confrontation Clause violations because hearsay statements were not "crucial" or "devastating") *with Parker*, 442 U.S. at 77, 78-79 (Blackmun, J., concurring) and *Evans*, 400 U.S. at 90, 92-94 (Blackmun, J., concurring) (Confrontation Clause violations but errors harmless).

age to the strength of the State's case," *Davis*, 415 U.S. at 319, this Court noted that the denied right of effective cross-examination was "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Davis*, 415 U.S. at 318 (quoting *Brookhart v. Janis*, 384 U.S. 1, 3 (1966)).[17]

Relying on that language, several courts, including the court below, have held that once an appellate court determines that the trial court erroneously restricted cross-examination, no harmless error analysis is permissible.[18] Those courts view Confrontation Clause errors as falling within the category, suggested in *Chapman*, 386 U.S. at 23 & n. 8, of generically harmful violations which require reversal without regard to the facts or circumstances of the particular case. *United States v. Uramato*, 638 F.2d 84, 87 (9th Cir. 1980); *Chipman v. Mercer*, 628 F.2d 528, 533 (9th Cir. 1980); *State v. Parillo*, 480 A.2d 1349, 1357-59 (R.I. 1984).[19] *See generally* 3A C. Wright, *Federal Practice and Procedure* §855 at 329-30 (2nd ed. 1982).

17. The language quoted from *Brookhart* had, in that earlier case, been lifted, as a concession, from a party's brief.

18. Despite its two tiered structure, the Delaware rule states a rule of automatic reversal for all Confrontation Clause errors. The Delaware approach purports to allow an inquiry into harmless error if, from the permitted cross examination, "the jury [had] sufficient information from which to infer bias." App. at A-7. However, at the same time, the Delaware court determines whether an error occurred by ascertaining whether the jury had been "exposed to facts sufficient for it to draw inferences as to the reliability of the witness." App. at A-5. Thus, if sufficient information had been presented, no constitutional violation occurred.

19. *Accord Bagley v. Lumpkin*, 719 F.2d 1462, 1464 (9th Cir. 1983), *cert. granted*, 105 S. Ct. 427 (1984) (No. 84-48). However, the Ninth Circuit has itself been in disharmony about an automatic reversal rule. *See, e.g., United States v. Price*, 577 F.2d 1356, 1361-64 (9th Cir. 1978), *cert. denied*, 439 U.S. 1068 (1979) (rejecting rule); *United States v. Williams*, 668 F.2d 1064, 1070 n. 14 (9th Cir. 1981) (noting division).

Other courts have declined to read *Davis* as articulating an automatic reversal rule and have held that erroneous restrictions on cross-examination may be found harmless. *United States v. Gambler*, 662 F.2d 834, 840-42 (D.C. Cir. 1981); *Kines v. Butterworth*, 669 F.2d 6, 11-13 (1st Cir.), *cert. denied*, 456 U.S. 980 (1981); *United States v. Smith*, 748 F.2d 1091, 1096 (6th Cir. 1984); *United States ex. rel. Scarpelli v. George*, 687 F.2d 1012, 1013-14 (7th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *Commonwealth v. Wilson*, 407 N.E. 2d 1229, 1247 (Mass. 1980); *Ransey v. State*, 680 P.2d 596, 597-98 (Nev. 1984); *State v. Pearce*, 414 N.E. 2d 1038, 1043-44 (Ohio 1980); *State v. Patterson*, 656 P.2d 438, 439 (Utah 1982).[20] Several courts view the harmless error analysis particularly appropriate in those cases where the appellate court, vested with the hindsight view not generally available to the trial court, can see that the witness did not provide crucial testimony. *United States v. Duhart*, 511 F.2d 7, 9 (6th Cir.), *cert. dismissed*, 421 U.S. 1006 (1975); *People v. Boyce*, 366 N.E.2d 914, 920-21 (Ill. App. 1977). Finally, one court has crafted a unique rule, mandating reversal for *in limine* restrictions on cross-examination but permitting the prosecution to show harmless error where the jury has garnished, from the allowed cross-examination, sufficient information to infer bias. *Springer v. United States*, 388 A.2d 846, 855-56 (D.C. App. 1978).[21]

20. The Fourth and Fifth Circuits have applied harmless error analysis while noting that language in *Davis* does suggest an automatic reversal rule. *Hoover v. State of Maryland*, 714 F. 2d 301, 306 & n. 4 (4th Cir. 1983); *Carrillo v. Perkins*, 723 F. 2d 1165, 1170-73 (5th Cir. 1984).

21. The divergence of approaches, resulting in different conclusions, is most starkly emphasized by the opinions by the two courts exercising jurisdiction in the District of Columbia. Thus, the District of Columbia has applied its *per se* rule requiring reversal where the trial court precluded cross-examination inquiry into the existence of a pending lawsuit between the complaining witness and the defendant. *Webb v. United States*, 388 A.2d 857, 859 (D.C. App. 1978). *But see Beynum v. United States*, 480 A.2d 698, 707 (D.C. App. 1984). In contrast, the Court of Appeals for the District of Columbia Circuit has held that the total denial of any inquiry into such a lawsuit, offered to prove bias, is an error which may be subjected to a *Chapman* analysis and, in the context of the case, be found harmless. *Gambler*, 662 F.2d at 842.

Yet, the Delaware court below stakes out a *per se* reversal position beyond any previously established. Because the Delaware court does not, in its criteria for determining the substantive violation, App. at A-5, consider whether the witness provided crucial testimony, the Delaware approach requires reversal for an erroneous restriction no matter how insignificant the witness' testimony. As such, the Delaware view stands in direct conflict with the decision in *United States v. Duhart*, 511 F.2d 7 (6th Cir. 1975), where the district court, as had the Delaware trial court, prohibited the defendant from cross examining a prosecution witness about other criminal charges which had been lodged against him. The Court of Appeals had little hesitation in finding that the restriction erroneous. Yet, it refused to embrace the notion that, in all cases, "the complete denial of access to an area which is properly the subject of cross-examination . . . cannot be considered harmless." 511 F.2d at 7. Instead, the court concluded that because the error involved a "merely buttressing prosecution witness" who did not present any testimony critical to the determination of guilt, it was harmless.

2. The Automatic Reversal Rule of the Decision Below Conflicts With Decisions of this Court

The prosecution urged that the Confrontation Clause error was harmless because the witness' not fully cross-examined testimony was merely cumulative or duplicative of facts consistently conceded by the defendant in his unchallenged pre-trial statements and his trial testimony. The Delaware court below instead applied a rule of automatic reversal. The opinion of that court runs di-

rectly contrary to a consistent stream of opinions of this Court which have not only generally rejected a rule of automatic reversal for Confrontation Clause errors, but which have utilized the same "cumulative evidence" rationale to determine harmlessness as the prosecution urged in the Delaware court.[22]

Eighty-five years ago, during the era of automatic reversal for constitutional violations, this Court, in *Motes v. United States*, 178 U.S. 458 (1900), ruled that the Confrontation Clause had been violated when a highly incriminatory pre-trial statement made by a missing, escaped co-conspirator had been admitted at trial. Although as a result of the error, the jury had heard "testimony" of a witness totally immune from trial cross-examination, this Court found the error harmless in the case of one defendant because the co-conspirator's recitation merely duplicated his own trial testimony in which he admitted his participation in the crime. To reverse for a Confrontation Clause error in those circumstances "would be trifling with the administration of the criminal law." 178 U.S. at 475.

Chapman did not alter the principles announced in *Motes*. Thus, in *Harrington v. California*, 395 U.S. 250 (1969), the jury had heard the pre-trial statements of two non-testifying co-defendants implicating Harrington by placing him at the scene of the robbery. While finding that the admission of the statements at a joint trial was error under the Confrontation Clause, this Court affirmed the conviction, refusing to adopt for such errors "the minority view in *Chapman* that a departure from constitutional procedures should result in automatic reversal."

22. The cases described below were cited to the Delaware Supreme Court. Brief for Appellee (State of Delaware) at 13-16, *Van Arsdall v. State*, No. 346, 1982 (Del. Nov. 19, 1984). The opinion below does not mention any of them. The "cumulative evidence" approach to a finding of harmless error is extensively analyzed in Field, *Assessing the Harmlessness of Federal Constitutional Error — A Process in Need of A Rationale*, 125 U. Pa. L. Rev. 15 (1976).

395 U.S. at 254 (citation omitted). Instead, after reviewing all of the evidence presented at trial, the Court concluded that the error could not have contributed to the verdict, because the co-defendants' statements merely echoed what Harrington had admitted in his own unchallenged pre-trial statement which had also been presented to the jury. This approach to Confrontation Clause errors has been consistently re-affirmed. *See Brown v. United States*, 411 U.S. 223, 231 (1973) ("The testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury."); *Schneble v. Florida*, 405 U.S. 427, 431 (1972) (the "inadmissable statements . . . at most tended to corroborate certain details of petitioner's comprehensive confession."). *Accord Parker v. Randolph*, 442 U.S. 62, 77, 80-81 (1979) (Blackmun, J., concurring).[23]

The decision below simply ignores the command of *Harrington*, including its common sense view of when unimpeached evidence may be said not to have contributed to the jury's verdict.[24] Ironically, in so doing, the

23. Indeed, in the context of violations of other constitutional provisions which may support a rule of automatic reversal, an exception has been recognized where the error relates to evidence, the truth of which the defendant has conceded and thus removed from dispute. Thus, the use of a statement taken in violation of the right of counsel, *Chapman*, 386 U.S. at 23 n. 8, may be harmless where the facts related have been exposed to the jury through other unchallenged confessions. *Milton v. Wainwright*, 407 U.S. 371, 373-74 (1972). Similarly, an erroneous presumptive jury instruction may be harmless if the defendant has conceded the existence of the element to which it relates. *Connecticut v. Johnson*, 460 U.S. 73, 87 (1983) (plurality opinion).

24. The Confrontation Clause violations in those cases involved error under *Bruton v. United States*, 391 U.S. 123 (1968). Yet, while *Bruton* involved the use of a non-testifying co-defendant's statement, the Confrontation Clause error is no different than a restriction on cross-examination. In both cases, the witness is not available for cross-examination. In *Bruton* cases, the witness is unavailable

Delaware court creates a topsy-turvy approach to reversals for Confrontation Clause violations. Errors in admitting testimony, totally immune from cross-examination, may be found harmless under *Harrington*. However, errors that occur when the live witness has been subjected to some cross-examination require reversal.

The lower courts are in disarray concerning the role of harmless error where cross-examination has been restricted. If a rule of automatic reversal, as expansively defined by the Delaware court, continues to be seen as the remedy compelled by the federal constitution, the lower appellate courts will quickly retreat to once again becoming "impregnable citadels of technicality," "unable to conserve [their] resources . . . by cleans[ing] the judicial process of prejudicial error without becoming mired in harmless error." *United States v. Hasting*, ___ U.S. ___, 103 S.Ct. 1974, 1980-81 (1983) (quoting R. Traynor, the Riddle of Harmless Error, 14, 81 (1970)). The decision of the Delaware Supreme Court, which simply articulates a rule of automatic reversal, presents the clear opportunity for this Court to hold that the Confrontation Clause does not require the states to ignore the important jurisprudential and societal policies upon which the harmless error rule is based.[25]

NOTES *(Continued)*

due to the prosecutor's and judge's choices not to sever; in the latter cases, the witness is unavailable because of the prosecutor's objection and the trial judge's evidentiary ruling.

25. Even in situations where the prosecutor has offered to the jury testimony he knew or should have known was perjured, this Court has declined to hold that a new trial is automatically required. *Giglio v. United States*, 405 U.S. 150, 154 (1972). Thus, notwithstanding the egregious nature of the prosecutor's conduct and its attendant effect on the fact-finding function of trial, this Court employs what is essentially a harmless error test. The same test is surely applicable when the prosecutor's conduct is merely the lodging of an evidentiary objection.

3. This Petition Should be Held Pending a Decision in *United States v. Bagley*, No. 84-48

The State of Delaware suggests that it may be appropriate to hold this petition pending this Court's decision in *United States v. Bagley, cert. granted*, ___ U.S. ___, 105 S.Ct. 427 (1984) (No.84-48).

Although *Bagley* involves the prosecutor's failure to furnish to the defendant evidence which he may have been able to use to impeach several government witnesses, the Court of Appeals utilized, in part, the Ninth Circuit's rule of automatic reversal for Confrontation Clause errors to overturn the conviction, despite a conclusion by the trial judge that the underclosed impeachment evidence would have not affected the verdict. *Bagley v. Lumpkin*, 719 F.2d 1462, 1464 (9th Cir. 1983).

The Solicitor General in *Bagley* advances the same position as that urged by the State of Delaware in this case: that erroneous restrictions on the defendant's ability to cross-examine witnesses does not automatically require reversal. Brief for the United States at 14-17 (filed January, 1985).

Conclusion

For the above reasons, this Court should grant this petition for certiorari or summarily reverse with instructions for the Delaware Supreme Court to determine if the Confrontation Clause error was harmless. Alternatively, this petition should be held pending a decision in *United States v. Bagley*, No. 84-48.

February, 1985

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF DELAWARE

ROBERT E. VAN ARSDALL,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 346, 1982
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee,	)	
	)	
and	)	
	)	
GANNETT COMPANY, INC.,	)	
	)	
Intervening	)	
Appellee.	)	

Submitted: September 10, 1984
Decided: November 19, 1984

Before McNEILLY, MOORE, and CHRISTIE, Justices.

Upon appeal from Superior Court. Reversed and remanded for a new trial.

William N. Nicholas (argued), Dover, and John R. Williams (argued) of Prickett, Jones, Elliott, Kristol & Schnee, Dover, for Appellant.

Gary A. Myers (argued), Deputy Attorney General, Georgetown, for Appellee.

Louis J. Finger, of Richards, Layton & Finger, Wilmington, for Intervenor.

CHRISTIE, Justice:

This case involves an appeal from a conviction in the Superior Court, Kent County, of murder first degree and possession of a deadly weapon during the commission of a felony.

The defendant, Robert Van Arsdall, was accused of murdering Doris Epps in a friend's apartment, shortly after the conclusion of an all day New Year's Eve party on December 31, 1981. The party, which lasted from approximately 11:00 a.m. to 12:00 midnight, took place in and between two adjacent apartments, one of which was occupied by Daniel Pregent and the other by Robert Fleetwood. It is apparent from the testimony given at trial that various persons had attended the party on and off over the course of the day, and that the defendant was one of those transient guests. The defendant testified that he had stopped in at the party for two brief periods in the late afternoon and early evening; he then returned to the party for a third time at about 11:30 p.m.

The evidence indicated that as the evening wore on, the party lost much of its jovial spirit. Pregent had an altercation with a female guest at one point and had to be restrained. The victim of the homicide, Doris Epps, had passed out by 10:30 p.m., perhaps as a result of excessive use of alcohol. She had been placed in a convertible sofa bed in the living room/bedroom area of Pregent's apartment. A short time later, a second altercation of some kind occurred, this time in Fleetwood's apartment, and this prompted Fleetwood to "close" the party in his apartment to everyone except his two friends, Alice Meinier and Mark Mood.

When the defendant returned to the party for the third time, he entered Pregent's apartment through a back entrance shortly after 11:30 p.m. At that time, only Pregent and the unconscious Doris Epps were present.

Fleetwood testified that shortly before going to sleep in his own apartment, he walked across the hall and looked into Pregent's apartment where he had seen the defendant sitting on the sofa bed next to Pregent's feet. Meinier testified that she, too, walked across the hallway in order to find out what time it was by looking at Pregent's clock, which was located in his kitchen. She stated that when she did this it was 11:53 p.m., and that she saw nothing unusual in the dark living room area of the apartment. Meinier went on to testify that about one hour later, the defendant came to Fleetwood's apartment with blood on his hands and shirt, holding a long, bloody knife.

The police were called and when they arrived a few minutes later, they found Epps' body lying in a pool of blood on the kitchen floor of Pregent's apartment. Pregent was asleep on the blood-splattered sofa bed in his darkened living room.

Both defendant and Pregent were subsequently arrested and charged with murder first degree. Defendant was tried first. The State relied on the circumstantial evidence outlined above. The defendant took the stand and denied that he took any part in the killing. He testified that he saw Pregent stabbing the victim. He was nevertheless found guilty by the jury. The State did not seek the imposition of capital punishment. Pregent did not testify at Van Arsdall's trial. Pregent was tried later and was found not guilty.

On appeal, the defendant makes many arguments. We find reversible error in one of the trial court's important rulings and, therefore, reverse the defendant's conviction and remand the case for a new trial.

I

The defendant argues that it was error for the trial court to limit his cross-examination of three prosecution witnesses. In the first instance, the defendant contends that the trial court erred by ruling that he could not ques-

tion Robert Fleetwood about Fleetwood's prior arrest and about a previous occasion on which Fleetwood had been questioned by a detective. The defendant contends that this ruling denied him the opportunity to expose Fleetwood's possible bias in testifying for the State and also deprived defendant of his right to confront the witnesses against him. U.S. Const. amend. VI; Del. Const. art. I, §7.[1] The defendant argues that the language this Court employed in *Weber v. State*, Del. Supr., 457 A.2d 674 (1983), makes it clear that we must reverse his conviction. We agree.

It is well established that the bias of a witness is subject to exploration at trial and is "always relevant as discrediting the witness and affecting the weight of his testimony." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974) [quoting 3A J. Wigmore, *Evidence* §940, at 775 (Chadbourn rev.ed. 1970)]; *Weber*, 457 A.2d at 680. Moreover, "cross-examination on bias is an essential element of the constitutional right of confrontation." *Wintjen v. State*, Del. Supr., 398 A.2d 780, 782 (1979). In *Weber*, we acknowledged the accused's right to a "certain threshold level of cross-examination," and observed that the presumption in favor of cross-examination requires the trial judge to permit inquiry into "any acts, relationships, or motives reasonably likely to create bias." *Weber*, 457 A.2d at 680, 682.

The trial court may not foreclose a legitimate inquiry into a witness' credibility before the defendant's Sixth

1. The U.S. and Delaware Constitutions provide in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend VI.

and

> "In all criminal prosecutions, the accused hath a right . . . to meet the witnesses in their examination face to face . . . ." Del. Const. art. I, §7.

Amendment confrontation right has been adequately met. *See Weber*, 457 A.2d at 681-682; *United States v. Meyer*, 556 F.2d 245, 250 (5th Cir. 1979). In *Weber* this Court set forth a two-part test for determining whether limitations imposed by the trial judge on a relevant line of cross-examination violate the accused's right of confrontation. Specifically, we said that we would look to the cross-examination permitted to ascertain (1) if the jury were exposed to facts sufficient for it to draw inferences as to the reliability of the witness and (2) if defense counsel had an adequate record from which to argue why the witness might have been biased. *Weber*, 457 A.2d at 682. *See, United States v. Summers*, 598 F.2d 450, 461 (5th Cir. 1979). Clearly, the trial court's decision to prohibit *all* questioning concerning the dismissal of charges against Fleetwood for being drunk on the highway prevented the jury from considering facts from which it could have drawn inferences about Fleetwood's testimonial reliability. Under the circumstances, the defense had a right to introduce such testimony.

The State correctly points out that "some topics will be of marginal relevance, and that the trial court in such situations may properly prohibit cross-examination or allow only limited questioning." *Weber*, 457 A.2d at 682. We note, moreover, that under some circumstances a judge may exclude evidence in instances such as these even though bias or prejudice might have been disclosed. *Weber*, 457 A.2d at 682. *See Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The State contends that the defendant's proposed lines of inquiry were only marginally relevant, and that the trial court properly ruled against such cross-examination. However, under the circumstances present in this case, we cannot agree. The question of bias was an important issue before the court and the excluded evidence was central to

that issue.[2] We conclude that the trial judge abused his discretion when he ruled that defendant could make no inquiry into Fleetwood's possible understanding that charges pending against him were dismissed in exchange for his cooperation with the State.[3]

The State next argues, however, that even if the defendant was deprived of his confrontation right, such error was harmless because Fleetwood's basic testimony was cumulative in nature and unimportant. We noted in *Weber* that "the standards used to determine if there is a violation of the confrontation clause in the first instance are similar, if not identical, to those used in deciding if the error was harmless." *Weber*, 457 A.2d at 683. In *Reed v. United States*, D.C. App., 452 A.2d 1173, 1176-77 (1982), the court stated a test consistent with *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) and with our ruling in *Weber* for determining whether a violation of the confrontation clause is harmless:

---

2. On voir dire, Fleetwood revealed the following:
Q [Mr. Reed]: "What was your understanding of why the charge was dropped?"
A [Fleetwood]:"Well, I did understand that I did feel that you wanted me to make sure that I knew what I was talking about, and I do feel that you wanted to make sure I had my story together before coming in here. So that is why I did feel that it was dropped."
* * * * *

3. Although we need not and do not consider whether the trial court erred in preventing the defendant from cross-examining Fleetwood about a previous occasion on which Fleetwood had been questioned by a detective in a separate murder investigation, we note that the presumption in favor of cross-examination requires that an accused be given some latitude to search for agreements or understandings, even where no actual or communicated deal exists. *See, Greene v. Wainwright*, 634 F.2d 272 (5th Cir. 1981); *United States v. Mayer*, 556 F.2d 245 (5th Cir. 1976); *Burr v. Sullivan*, 618 F.2d 583 (9th Cir. 1980).

> Where the record reflects a curtailment of a requested line of bias cross-examination *in limine*, so that the jury is unable to perform its fact-finding function in inferring bias from the testimony as a whole, we will assess cross-examination errors by a per se error standard. If, however, the trial court has permitted *some* cross-examination so that the jury has sufficient information from which to infer bias (should it so choose), this Court will evaluate error by application of the harmless constitutional error test of *Chapman v. California, supra* [386 U.S. 18,87 S.Ct. 824, 17 L.Ed.2d 705 (1967)]. To hold harmless such error in curtailing constitutionally protected cross-examination, it must be clear beyond a reasonable doubt " . . . that the defendant would not have been convicted without the witness' testimony . . . ." [Citing *Springer v. United States*, D.C. App., 388 A.2d 846, 856 (1978)].

We hold that under the circumstances of this case, where the defendant was subjected to a blanket prohibition against exploring potential bias through cross-examination, the trial court committed a per se error. Consequently, the actual prejudicial impact of such an error is not examined and reversal is mandated. *See Webb v. United States*, D.C. App., 388 A.2d 857, 858 (1978).

The defendant also argues that it was error for the trial court to limit his cross-examination of Alice Meinier. He contends that his right to cross-examination encompasses an absolute right to question a witness about his or her address. We find his argument to be without merit. It is clear for the record that the defendant sought to elicit information not about Meinier's place of residence, but rather information about with whom she had been residing. *Cf. United States v. Harris*, 501 F.2d 1, 9 (9th Cir. 1974) (requiring cross-examinaiton about an address). The trial court did not err in ruling against such

questioning since it apparently thought that counsel's main purpose was to subject the witness to harassment or humiliation. *United States v. Harris*, 501 F.2d at 9.

Finally, we find no error in the trial court's decision to limit the defendant's cross-examination of detective Bowers. The defendant claims that the State, in its direct examination, implied that a thorough police investigation at the murder scene led to defendant's arrest. Defendant now argues that the State, having raised the issue, opened itself to cross-examination on this point, and that the trial court abused its discretion in ruling that defendant could not question the detective on this matter. We do not agree. Assuming that the defendant's inquiry was directed at the issue of the thoroughness of the police investigation, the court could have reasonably concluded that such questioning was collateral because Alice Meinier's statement to the police and the blood found on the defendant's clothing justified the arrest.

II

The defendant next raises several arguments which address the propriety of the trial court's evidentiary rulings. Although none of the alleged errors amounts to reversible error, we discuss some of the issues presented because there will be a new trial.

Initially, defendant contends that the trial court abused its discretion in admitting various exhibits into evidence. The defendant maintains that the admission of the victim's blood-stained clothing and, at least, one "gruesome" photograph of the victim exposed the jury to evidence which was highly prejudicial and inflammatory. Defendant insists that any probative value of such evidence was outweighed by the prejudice involved. D.R.E. 403. In addition, the defendant claims that the admission of several articles of his clothing and numerous photographs of the victim were unnecessary and cumulative. We hold that these arguments are without merit.

The trial court has wide discretion in admitting into evidence photographs of injuries to a victim. *Dickens v. State*, Del. Supr., 437 A.2d 159, 162 (1981). The court's discretion in admitting a victim's clothing is equally broad. *See Longoria v. State*, Del. Supr., 168 A.2d 695, 703, *cert. denied*, 368 U.S. 10 (1961). *Cf. Dutton v. State*, Del. Supr., 452 A.2d 127 (1982) (victim's remains not necessarily excludable.) The trial court ruled that the material and probative value of the evidence outweighed any prejudicial effect it might have. This Court cannot say that the trial court abused its discretion.

Similarly, the defendant's claim that the introduction of his clothing was irrelevant is specious. *See, Dickens v. State*, 437 A.2d at 163.

Finally, it must be remembered that D.R.E. 403 authorizes the trial judge to exclude only the needless presentation of cumulative evidence, and the court had wide discretion to determine whether the evidence in question was needlessly cumulative.

The defendant also asserts that it was error for the trial court to permit the prosecution to place into evidence various articles which the defendant wished to introduce as defense exhibits. We find no merit to defendant's argument.

The trial court has broad authority in determining the mode and order of presenting evidence, and its choice can be overturned only if it infringes on a constitutional right or constitutes an abuse of discretion. D.R.E. 611(a); *Geders v. United States*, 425 U.S. 80, 86, 96 S.Ct. 1330, 1334, 47 L.Ed.2d 592 (1976). It was not an abuse of discretion to refuse to allow the defendant to place exhibits into evidence during the prosecution's case-in-chief. *See State v. Washington*, La. Supr., 292 So.2d 234, 237-38 (1974).

The defendant next argues that the trial court abused its discretion in admitting into evidence transcripts of tape

recordings. The defense maintains that since the recordings themselves were the "best evidence", the additional admission of the transcripts of the recordings violated the"best evidence" rule. D.R.E. 1001-1002. The defendant relies on dicta contained in the case of *Bonicelli v. State*, Okla. Ct. App., 339 P.2d 1063, 1065 (1959). However, most courts which have addressed this issue have rejected the position the defendant here takes, especially where, as here, the defense counsel "agreed" that the transcripts were fair and accurate reports of what was said. *See United States v. Turner*, 528 F.2d 143, 167-68 (9th Cir.), *cert. denied*, 423 U.S. 996 (1975); *United States v. Carson*, 464 F.2d 424, 436-37 (2d Cir. 1972). We reject defendant's contention.

III

Defendant contends that the trial court's failure to sequester the chief investigating officer, or alternatively, to require the officer to testify first, was an abuse of discretion, since the officer had a chance to hear the testimony of other witnesses — including defense witnesses — and he had an opportunity to tailor or fabricate his subsequent testimony accordingly.

However, it is clear in Delaware that sequestration is discretionary with the trial judge, *Holmes v. State*, Del. Supr., 422 A.2d 338, 340 (1980), and that it is often deemed proper to exempt the chief investigating officer from a sequestration order. *Grace v. State*, Del. Supr., 314 A.2d 169, 170 (1973). It follows that it is also within a court's discretion to refuse to compel the officer to testify first and to allow the prosecution to present its evidence in chronological fashion. *See United States v. Butera*, 677 F.2d 1376, 1380-81 (11th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 735 (1983).

IV

The defendant argues that the trial court erred in permitting Dr. Lee to give an expert opinion when his testimony appeared to be speculative in nature. The defendant's position is that Dr. Lee could not have given an informed opinion as to the movement of the victim's body because he lacked knowledge of a buttock wound, and that the doctor's use of words, such as "could", "possibly", and "maybe" indicate that he was engaged in speculation. We find defendant's argument to be without merit. We note that on cross-examination, the doctor testified that the conclusions he had reached concerning the movement of the victim's body would not have changed had he been aware of the buttock wound. We also conclude that the doctor's choice of words did not indicate that his conclusions were based on speculation. *See Air Mod Corp. v. Newton*, Del. Supr., 215 A.2d 434, 438 (1965).

V

The defendant next argues that the trial court abused its discretion in refusing to consider an affidavit he presented in a pretrial suppression hearing. This argument is without merit. The court did not abuse its discretion in refusing to consider the affidavit in this case since the defendant refused to be cross-examined on the contents of that affidavit.

VI

Defendant contends that the trial judge's instructions to the jury were erroneous in several respects.

Defendant argues that the trial court committed reversible error in giving the jury an accomplice instruction which was based on the possibility that the offense may have been committed by Daniel Pregent, and that the defendant may have been his accomplice. Defendant

insists that there was insufficient evidence to warrant such a charge. We do not find the instruction to be erroneous. However, if there was error, it was clearly harmless error. *Barnes v. State*, Del. Supr., 352 A.2d 409, 410-411 (1976).

The defendant argues that the trial court erred in instructing the jury to disregard defense counsel's comment inclosing that "circumstantial evidence is the weakest form of evidence." The law, however, assigns no lesser degree of probity to circumstantial evidence. *Holden v. State*, Del. Supr., 305 A.2d 320, 322 (1973). Hence, the trial court was correct when it instructed the jury to disregard defense counsel's erroneous statement.

The defendant says that the court's charge to the jury lacked sufficient factual detail. In the absence of any indication by the defendant suggesting the omission of specific and necessary factual details, the general instruction which traced the statutory language of the criminal statute is deemed to be adequate to inform the jury of the factual issues to be resolved. *Daniel v. McAllister*, 631 F.2d 1256, 1260 (5th Cir. 1980), *cert. denied*. 452 U.S. 907 (1981). We find no error in what the trial court did in this respect.

VII

The defendant argues that the trial judge erred in acting as one of the drivers who took the jurors to their overnight accommodations outside defendant's presence and outside the presence of legal counsel. The defendant claims that this *ex parte* contact infringed upon the constitutional commands of "presence", assistance of counsel, and jury impartiality. We conclude that the limited personal contact between judge and jury should have been avoided but it was harmless beyond a reasonable doubt, as that phrase is used in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The defendant goes on to assert that the trial court's "limited voir dire" of the jurors the next morning did not meet the requirements of the type of post-trial hearing which appears to have been mandated by the United States Supreme Court in *Rushen v. Spain*, ___ U.S. ___ , 104 S.Ct. 453 (1983). (The *Rushen* case involved an *ex parte* communication between the trial judge and a juror as to an incorrect answer the juror had given to a voir dire question.) It is clear, however, that a post-trial hearing is not required in all instances. Although the Supreme Court found that a post-trial hearing was appropriate in that case, the court went on to state that "[t]he adequacy of any remedy is determined solely by its ability to mitigate constitutional error, if any, that has occurred." *Rushen*, 104 S.Ct. at 456.

In the case at bar the trial judge simply drove some of the jurors to their lodgings. The next day, at the defendant's request, the jurors were questioned about their contact with the judge. The jurors reported that they had had no communication with the judge concerning the case. Under the circumstances, the voir dire was adequate.

The court below committed no reversible error in driving the jury to its lodgings or in its later voir dire. However, such contact with jurors should be avoided in the future.

VIII

The defendant next makes a series of arguments objecting to the jury selection process. The defendant's basic position is that the use of voter registration lists as the sole source for the selection of potential jurors was inadequate to assure a representation from a fair cross section of the community. 10 *Del.C.* § 4501; U.S. Const. amend. VI; Del. Const. art I, § 7.[4] Ultimately, the de-

4. 10 *Del.C.* § 4501 provides in pertinent part:
"It is the policy of the State that all litigants in state courts

fendant attacks three statutory provisions in support of his contention.

(a) The defendant initially asserts that the exclusive use of voter registration lists is improper in Kent County because of the large number of individuals employed at Dover Air Force Base who may be registered to vote in other states, and thus, would not be called to serve on a Kent County jury. In effect, the defendant also challenges 10 *Del.C.* § 4504(b)(6)(i),[5] which exempts military personnel from jury service. The defendant argues that exempting the population at the military facility prevents the venire from having a fair cross section of the community. We find the defendant's argument unpersuasive.

In *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979) the United States Supreme Court held that:

> "[I]n order to establish a *prima facie* violation of the fair cross section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that the under-representation is due to a systematic exclusion of the group in the jury selection process."

NOTES *(Continued)*

entitled to trial by jury shall have the right to . . . juries selected at random from a fair cross section of the county wherein the court convenes."

We find that the policy of § 4501 is embodied in the due process requirement of the U.S. and Delaware Constitutions. Thus, the defendant's failure to comply with the procedural requirements of 10 *Del.C.* § 4508(a), (d) does not pre-empt his right to challenge any provision dealing with jury selection. *See United States v. Hawkins*, 566 F.2d 1006, 1014 (5th Cir.), *cert. denied*, 439 U.S. 848 (1978).

5. 10 *Del.C.* § 4504(b)(6)(i) states that the jury selection plan:
". . . shall provide for exemptions of . . . (i) Members in active service in the Armed Forces of the United States. . . ."

Moreover, to satisfy the "distinctive" requirement, a particular group must have a unique outlook or "perspective on human events" not shared by other segments of the community, *see Taylor v. Louisiana*, 419 U.S. 522, 532, n.12, 95 S.Ct. 692, 698, n.12, 42 L.Ed.2d 690 (1975), and this distinctive requirement must exist as to a substantial number of people. *Duren*, 439 U.S. at 370. Thus, the statutory exemption for military personnel would violate the fair cross-section requirement only if the defendant can show that those in the military service who have not registered to vote in Delaware have a unique perspective not shared by other members of the community. *See Walker v. State*, Alaska Supr., 652 P.2d 88, 92-93 (1982); *Taylor*, 419 U.S. at 534. Defendant has not met this burden.

We also note that the Supreme Court has upheld "exemptions from jury service to individuals . . . engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare." *Taylor*, 419 U.S. at 534. It seems clear that occupations related to national defense are critical to the community's welfare. *See* 28 U.S.C. § 1863(b)(6)(i),[6] which is the federal counterpart to 10 *Del.C.* § 4504(b)(6)(i).

(b) The defendant next makes two separate, but closely related challenges. He argues that statutory disqualification from jury service of persons residing in the county for less than one year, 10 *Del.C.* § 4506(b)(1), and persons accused or convicted of serious crimes, 10 *Del. C.* § 4506(b)(5), deprives him of due process and equal protection of the laws. U.S. Const. amends. V, VI,

6. 28 U.S.C. § 1863(b)(6)(i) (Supp 1984) reads in pertinent part:
"The [jury selection] plan shall provide for the exemption of the following persons: (1) members in active service of the Armed Forces of the United States. . . ."

XIV. Del. Const. art. I, § 7.[7] We will address each of the defendant's claims:

Due Process: Most courts facing challenges of this type of juror residency requirement have held that newer residents are not a "distinctive" or "cognizable" class. *United States v. Maskeny*, 609 F.2d 183, 192 (5th Cir.), *cert. denied*, 447 U.S. 921 (1980); *United States v. Perry*, 480 F.2d 147, 148 (5th Cir. 1973). Indeed, such "group's membership — cutting across economic, social, religious, and geographic lines — changes day to day, creating lack of real commonality of interest among the newly migrated." *Adams v. Superior Court of San Diego County*, Cal. Supr., 524 P.2d 375, 378 (1974). The defendant, in urging us to adopt Justice Mosk's dissenting opinion in *Adams*, argues that newer residents are an identifiable and ascertainable group, and are therefore, cognizable. *See Adams*, 524 P.2d at 383 (Mosk, J., dissenting).

We cannot accept the defendant's position. Even if we assume that newer residents are an identifiable and ascertainable group, evidence of such group's "distinctiveness" is lacking. The United States Supreme Court, in recent decisions, has found that a distinct group in the community possesses a unique outlook or "perspective on human events." *See Taylor v. Louisiana*, 419 U.S. at 532, n.12. The defendant has not shown that newer res-

7. The relevant provisions provide in pertinent part:

"... [that] any person [is] qualified to serve on ... juries in Superior Court unless he:

(1) .. has [not] resided for a period of one year within the county ... or ...

(5) Has a charge pending against him for the commission of, or has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than 1 year ...." 10 *Del.C.* § 4506(b)(1), (5).

and

"No State shall make or enforce any law which ... den[ies] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

idents possess a common viewpoint not shared by other segments of the community. Furthermore, he has failed to establish that newer residents exist in such substantial numbers that, assuming a common perspective, the remaining pool of potential jurors would be unrepresentative of the community. *See Taylor*, 419 U.S. at 534; *Duren v. Missouri*, 439 U.S. at 370.

For similar reasons we find that the defendant has failed to demonstrate that exclusion of the class of persons then accused of, or previously convinced of serious crimes, limits the venire as a fair cross section of the community. Although it is true that members of this group share the common experience of being or having been in conflict with the authorities, the defendant has not shown that the perspective gained from such an experience is absent in other segments of the community, *see, Rubio v. Superior Court of San Joaquin Cty.*, Cal. Supr., 593 P.2d 595, 598-99 (1979), or alternatively that exclusion of such group would pose [a] substantial threat that the remaining pool of jurors would not be representative of the community." *Taylor*, 419 U.S. at 534.

We hold that the one-year residency requirement of §4506(b)(1) and the exclusion from jury service of persons who have serious criminal charges then pending against them or have been convicted of serious crimes under §4506(b)(5), do not deprive the defendant of due process of law under the United States and Delaware Constitutions. U.S. Const. amends, VI, XIV; Del. Const. art I, §7.

Equal Protection: The defendant also claims that the provisions of §4506(b)(1) and (5) deprive him of equal protection of the laws. U.S. Const. amend. XIV. In the first instance, we find that the defendant has no standing to challenge the residency requirement under the equal protection clause. It is clear from the record that the defendant is actually asserting a claim *on behalf* of the newer resident class. Because he is not a member of the excluded class, the defendant has no standing to make an

equal protection claim, unless he can show that he has been personally injured by the exclusion of newer residents from the jury list. *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 32 L.Ed.2d 83 (1972). Since the defendant's "injury" is predicated on his claim that the venire was not composed of a fair cross section of the community, our resolution of that preliminary issue disposes of any equal protection claim.

The defendant's challenge to the exclusion of persons presently accused or previously convicted of serious crimes presents a different situation, since this defendant is a member of this arguably cognizable class. We conclude, however, that the exclusion of such persons from jury service does not deprive the defendant of equal protection of the law.

The defendant does not claim that the classification in question is "suspect" (as such classifications are primarily used in cases involving unconstitutional discrimination), and the defendant concedes that jury service is not a "fundamental right." It follows that the exclusion does not violate equal protection if it bears any rational relationship to some legitimate State objective. *Lowicki v. Unemployment Insurance Board*, Del. Supr., 460 A.2d 535, 538-39 (1983). *See Rubio v. Superior Court of San Joaquin Cty.*, 593 P.2d at 600. The defendant argues that the State could have no legitimate interest in excluding persons accused of criminal acts who remain presumptively innocent, and that §4506(b)(5) is unconstitutionally broad. We disagree. The State has an obvious and compelling interest in preserving the right to a fair trial by an impartial jury. The legislature could reasonably determine that persons presently accused or previously convicted of serious crimes, as present or past adversaries of "the system," may be biased in favor of a criminal defendant, whom is seen as a fellow victim of the system. *See Rubio*, 593 P.2d at 600. The State could also reasonably conclude that jury service would interfere with an accused's preparation of his own defense, and conversely,

that an accused's preoccupation with his own possible trial would interfere with his duties as a juror.

IX

The defendant next claims that the trial court did not take adequate steps to assure the jury's impartiality. He contends that the trial court abused its discretion in rejecting five requested jury voir dire questions, which dealt with racial bias, and in failing to provide reasons for its denial of these and seventy-three other proposed questions.[8]

It is well established that the trial court's discretion on voir dire is restricted only by essential demands of fairness. *Hooks v. State*, Del. Supr., 416 A.2d 189, 195 (1980); *Shields v. State*, Del. Supr., 374 A.2d 816 (1977), *cert. denied*, 434 U.S. 893, 98 S.Ct. 271, 54 L.Ed.2d 180 (1977).

A trial judge is required to inquire into the issue of racial bias when requested to do so, and he has a duty to present to the prospective jurors an appropriate question or questions, submitted by defense counsel, if such question or questions are designed to reveal such bias. *Hooks*, 416 A.2d at195-96. *See Preston v. State*, Del.Supr., 306 A.2d 712, 716 (1973). We conclude, however, that the questions here proposed dealing with racial bias were in-

8. The proposed questions relating to racial bias read as follows:
   69. Do you have any personal or professional relationships with blacks?
   70. Do you think that black people have the same values and standards as other members of society?
   71. Do you feel that there is any difference between black people and white people?
   72. Do you think that black people have a more difficult time getting along in contemporary American society?
   73. Have you ever had any dealings or experiences with black people that might make it more difficult for you to sit in impartial judgment on this case knowing that the alleged victimwas black?

appropriate, since they did not address the possibility of racial prejudice against the defendant, who is a white person, but instead addressed the possibility of prejudice against the black victim.

We find no error in the failure to give the other voir dire questions which were requested.

The defendant also indicates that the voir dire was procedurally inadequate to determine the effect of pretrial publicity upon potential jury members. The defendant's claim is clearly without merit. The trial court's procedure of initially asking the venire in general whether they had heard or read anything about the case, and then questioning individually those who responded affirmatively, was proper and reasonably calculated to discover bias. *See United States v. Chagra,* 669 F.2d 241, 253-54 (5th Cir.), *cert. denied,* ____ U.S. ____, 103 S.Ct. 102 (1982); *United States v. Barton,* 647 F.2d 224, 230 (2d Cir. 1981).

For corresponding reasons we find that the measures taken to assure the jury's isolation from publicity during the trial were adequate. Under the guidelines set forth in *Smith v. State,* Del. Supr., 317 A.2d 20, 23 (1974), the judge admonished the jurors not to read media accounts at the end of each trial day, and inquired of the jurors, at the beginning of each subsequent day, whether they had heard or read anything about the case. No juror ever responded affirmatively. We reject the defendant's argument that the trial judge, should have admonished the media to adhere strictly to the Bar-Bench Press Declaration of Delaware.

X

The defendant next argues that the trial court erred in denying defendant's motion for funds to employ a private investigator. The defendant maintains that a particular expert-investigator was needed to counteract the State's forensic evidence and to perform various other

investigative functions. Since he had made a record of why an investigator was desired, the defendant argues he was constitutionally entitled to one and that the trial court's decision not to accede in his request deprived defendant of his right to effective assistance of counsel and equal protection of the law. U.S. Const. amends. VI, XIV. Del. Const. art. I, §7.

The decision to grant or deny funds for investigative services is within the sound discretion of the court. *See State v. Akyana,* Me. Supr., 456 A.2d 1255, 1262 (1983). An indigent defendant is not entitled to have investigative services provided by the State, unless he is able to show that such services are reasonably necessary for the preparation of an adequate defense. *United States v. Davis,* 582 F.2d 947, 951 (5th Cir. 1978), *cert. denied,* 441 U.S. 962 (1979). The trial court's ruling will not be overturned on appeal unless there is a clear and convincing showing of substantial prejudice as a result of the denial of funds for investigative services. *Mason v. Arizona,* 504 F.2d 1345, 1353, 1355 (9th Cir. 1974), *cert. denied,* 420 U.S. 936 (1975).

In this case defendant has failed to demonstrate such prejudice as would justify reversal of the trial court's decision. He has not identified any reasonably necessary services of an investigator which would have been material to the defense of this murder charge. Thus, there is no realistic suggestion that the particular investigator sought would have been able to "counteract" the State's evidence. And in any event, the defendant has not shown that it would have been impracticable for his counsel to conduct the proposed investigation. *See, Mason,* 504 F.2d at 1353. Under these circumstances, we cannot infer that the purported investigative services were necessary and conclude that the trial court's ruling did not deprive the defendant of effective assistance of counsel.

We also hold that defendant in this case has not shown that the State's failure to provide an investigator deprived him of equal protection of the laws. The de-

fendant cannot reasonably claim that he has a general "fundamental right" to investigative services and, therefore, any disparity in the availability of investigative resources to indigents represented by the Public Defender as opposed to indigents represented by appointed counsel constituted nothing more than harmless error in this case. We note, however, as a general proposition, that where a reasonable need is clearly demonstrated, the State must provide the same ancillary services to those indigent persons represented by court appointed attorneys as it provides to those represented by the Public Defender.

XI

We have been requested by defendant and by the intervening newspaper publisher to review the propriety of the standards applied by the trial court in denying the defendant's motion to close all pretrial proceedings to the public and press.[9] Under the present circumstances we decline to do so.

We conclude that the defendant has failed to establish that he was prejudiced by either the standards employed by the trial court in its evaluation of defendant's motion or by the subsequent pretrial publicity. There is no indication that defendant's right to a fair trial was jeopardized by the dissemination of any information disclosed in pretrial proceedings. Under the circumstances, it is unnecessary for the Court to specify which standard the trial court should have applied. *See United States v. Civella*, 648 F.2d 1167 (8th Cir.), *cert. denied*, 454 U.S. 867 (1981).

* * * * *

9. Defendant urges this Court to adopt the constitutional balancing test used by the majority of the Supreme Court in *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). The intervening newspaper publisher contends that the three-part formula used by the trial court is the proper standard of review.

The judgments and convictions are set aside, and the case is returned to Superior Court for a new trial.

APPENDIX B

IN THE SUPREME COURT OF
THE STATE OF DELAWARE

ROBERT E. VAN ARSDALL,	§	
	§	
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	No. 346, 1982
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: December 6, 1984
Decided: December 12, 1984

Before McNEILLY, MOORE, and CHRISTIE, Justices, constituting the Court en banc.

ORDER

This 12th day of December, 1984, it is ordered that appellant's motion for rehearing en banc is

DENIED.

BY THE COURT:

/s/ ANDREW D. CHRISTIE
Justice

APPENDIX C

Relevant Delaware Statutory Provisions

11 Del. C. §636 (1979). Murder in the first degree

(a) A person is guilty of murder in the first degree when:

(1) He intentionally causes the death of another person.

11 Del. C. §1447 (1979). Possession of a deadly weapon during commission of a felony

(a) A person who is in possession of a deadly weapon during the commission of a felony is guilty of possession of a deadly weapon during commission of a felony.

11 Del. C. §271 (1979). Liability for the conduct of an other — Generally.

A person is guilty of an offense committed by an other person when:

. . . .

(2) Intending to promote or facilitate the commission of the offense he:

. . . .

b. Aids, counsels or agrees or attempts to aid the other person in planning or committing it.

21 Del. C. §4149 (1981). Walking on highways under influence of drugs or liquor.

No person shall walk or be upon a highway of this State while under the influence of intoxicating liquor and/or narcotic drugs to a degree which renders himself a hazard.

NO. 84-1279

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF DELAWARE,

Petitioner,

v.

ROBERT E. VAN ARSDALL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRICKETT, JONES, ELLIOTT,
KRISTOL & SCHNEE

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Attorneys for Respondent,
Robert E. Van Arsdall

Dated: March 8, 1985

QUESTION PRESENTED

Is the Supreme Court of Delaware required under the Confrontation Clause to apply a harmless error rule to a total prohibition in limine of relevant bias cross-examination of a prosecution witness?

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TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Confrontation Clause of the Sixth Amendment to the United States Constitution, this case also involves Delaware Constitution of 1897, Article I, §7, which states:

> In all criminal prosecutions, the accused hath a right to be heard by himself and his counsel, to be plainly and fully informed of the nature and cause of the accusation against him, to meet the witnesses in their examination face to face, to have compulsory process in due time, on application by himself, his friends or counsel, for obtaining witnesses in his favor, and a speedy and public trial by an impartial jury; he shall not be compelled to give evidence against himself, nor shall he be deprived of life, liberty, or property, unless by judgment of his peers or by the law of the land.

STATEMENT OF THE CASE

This is a first degree murder prosecution based upon circumstantial evidence.[1] Van Arsdall v. State, 486 A.2d 1, 5 (Del. 1984) The location of this homicide was a three story apartment building in Smyrna, Delaware. Tr. II-117 (Whittaker).[2] On December 31, 1981, the front second floor apartment in the building was rented by Robert Fleetwood and the rear second floor apartment was occupied by Daniel Pregent, although that unit was rented to another individual. Tr. II-118 (Whittaker). There is a second floor hallway separating the Fleetwood and Pregent apartments. Tr. II-125 (Whittaker). Entrance from Commerce Street to the Fleetwood apartment is by means of a front door and the second floor hallway. Tr. II-120 (Whittaker) Entrance to the Pregent apartment can be made from either the front door on Commerce Street and the second floor hallway, or by means of an outside stairway located behind the apartment building. Tr. II-121-122 (Whittaker).

During his second visit to the Pregent apartment on December 31, 1981, Daniel Pregent showed Robert E. Van Arsdall the back door to his apartment and stated that Van Arsdall could visit him later by entering at the back of the building. Tr. X-41-42 (Van Arsdall). At approximately 11:30 p.m. on December 31, 1981, Van Arsdall returned to the Pregent apartment by the rear stairway. Tr. X-41 (Van Arsdall). After knocking on the back door of the Pregent apartment, Van Arsdall was invited in by Pregent. Tr. X-42-43 (Van Arsdall).

Prosecution witness Robert Fleetwood testified at trial that he left his apartment "around 11:00" and walked across the hall to Pregent's apartment. Tr. III-49 (Fleetwood). The door of the Pregent apartment was open, and Fleetwood claimed that he observed Van Arsdall sitting on the bed and Pregent's feet hanging from the bed. Tr. III-50 (Fleetwood). Fleetwood did not know if Doris Epps, the

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1 The State of Delaware in its February 7, 1985 Petition for Writ of Certiorari to the Delaware Supreme Court omits several crucial facts contained in the trial record of this 1982 proceeding in the Superior Court of the State of Delaware in and for Kent County. Several of these facts are discussed in this Statement of the Case. In addition, the Petitioner, State of Delaware, also attempts to simplify the complex factual nature of the evidence produced during this three week murder trial in an effort to demonstrate that certiorari review by this Court is appropriate and that the denial of defense counsel's right to cross-examine an important prosecution witness on the issue of interest or bias was merely harmless error under the facts of this case.

2 As in the State of Delaware's Petition for Writ of Certiorari, citations to the trial transcript (Tr.) will be by volume and page number, followed by the witness' name.

victim, was present in the Pregent apartment at this time, but he did recollect that the lights were on in both the kitchen and living room/bedroom. Tr. III-50, 52 (Fleetwood).

Van Arsdall never acknowledged observing or being observed by prosecution witness Fleetwood prior to the Epps homicide.

During his cross-examination at trial, Van Arsdall stated that the last time he had seen Fleetwood prior to the homicide was during his second visit to the Pregent apartment and before his return at 11:30 p.m. Tr. X-78 (Van Arsdall). This defense assertion was contradicted by Fleetwood, who claimed to have seen Van Arsdall in the Pregent apartment at approximately 11:00 p.m. Tr. III-49-50 (Fleetwood). The importance of this contradiction between the testimony of Fleetwood and Van Arsdall was highlighted at trial by the prosecutor's provocative question to Van Arsdall during cross-examination as to why he went over to the Fleetwood apartment after the homicide: "Are you sure you didn't go across the hall to kill him?"[3] Tr. X-78 (Van Arsdall).

Robert S. Crain, a prosecution witness, testified that the victim, Doris Epps, passed out at the New Year's Eve party, and that he and Pregent placed Epps on Pregent's sofa bed in the living room. Tr. II-111 (Crain). During the course of the New Year's Eve party, Crain witnessed an argument between Pregent and Ida Mae Stevens, another Pregent party guest, which he described as follows: "Well,

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3 This cross-examination by the prosecutor also suggests that even if Van Arsdall claims he did not see Fleetwood when the latter said he visited the Pregent apartment at "around 11:00," such an inference cannot be drawn by the jury because if Van Arsdall crossed the hall after the Epps homicide, it was for the purpose of eliminating a witness to his presence at the scene immediately prior to the murder.

he wanted to fight, I believe he wanted to hit Ida Mae or something like that, and we had to sort of like hold him down and calm him down. He kicked a hole in the wall and everything." Tr. II-95 (Crain). When Crain and his brother Michael left Pregent's apartment between 11:00 and 11:15 p.m., Pregent and the now unconscious Doris Epps were lying on the bed. Tr. II-96 (Crain). When Crain left, he thought there was a light and radio on in the living room. Tr. II-113 (Crain). At that time, only Pregent and Epps were present, and Doris Epps was alive. Tr. II-113-114 (Crain).

Alice Jane Meinier, another prosecution witness,[4] also recalled the incident when Pregent had to be restrained from fighting with Ida Mae Stevens and she witnessed Pregent kick a hole in the hallway wall while being so restrained.[5] Tr. IV-54 (Meinier). Her recollection was that this incident involving Pregent occurred sometime after 6:30 p.m. Tr. IV-11, 55 (Meinier). Later that evening, both Fleetwood and Meinier left the Fleetwood apartment when Fleetwood went to get beer and Meinier walked over to Pregent's apartment to use the bathroom. Tr. IV-55 (Meinier).

When Fleetwood and Meinier left Fleetwood's apartment, Pregent became involved "in some sort of a scuffle" in Fleetwood's apartment, and glasses, ashtrays, and a table were broken." Tr. IV-55-56 (Meinier). When Fleetwood returncd from his evening visit to the liquor store, he found that Robert Crain and another individual had messed up his apartment during an argument. Tr. III-47-48 (Fleetwood). Fleetwood made everyone except Meinier and Mark Mood leave his apartment. Tr. III-48 (Fleetwood).

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4 The only defense trial witness was the defendant himself, Robert E. Van Arsdall.

5 She described Pregent as being "wild" during the altercation with Ida Mae Stevens. Tr. IV-54 (Meinier).

Although Fleetwood claims that he left his apartment again around 11:00 p.m. to go across the hall to Pregent's [Tr. III-49 (Fleetwood)], Meinier testified that Fleetwood did not leave his apartment after returning from the liquor store. Tr. IV-59 (Meinier). Meinier claims that she returned to Pregent's apartment later that evening to find out the time. Tr. IV-14 (Meinier). On that occasion she observed a clock on Pregent's kitchen floor,[6] and the time was 11:53 p.m. Tr. IV-14 (Meinier). There was a light on in both the kitchen and bathroom of the Pregent apartment, but Meinier claimed that the bedroom/living room area was dark at 11:53 p.m. Tr. IV-14 (Meinier).

Judith G. Tobin, M.D., the assistant state medical examiner, performed an autopsy on the body of Doris Epps at approximately 12:30 p.m. on January 1, 1982. Tr. II-52, 56 (Tobin). Dr. Tobin estimated the time of death to be between 12:00 midnight and 1:00 a.m. on January 1, 1982. Tr. II-65-66 (Tobin).

Van Arsdall attempted to sleep on the sofa cushions on the floor of Pregent's living room. Tr. X-49-50 (Van Arsdall). Van Arsdall was awakened when something was being drug by his feet. Tr. X-50 (Van Arsdall).

Van Arsdall sat up to observe what was happening, and he saw Pregent dragging Epps by her wrists. Tr. X-50 (Van Arsdall). From the kitchen light, Van Arsdall observed that Epps' body was limp. Tr. X-51 (Van Arsdall). He went to the doorway of the kitchen and observed Pregent squatting over Epps' body. Tr. X-52 (Van Arsdall). Epps was lying on her back on the kitchen floor, and Pregent was stabbing her

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6 The victim's body was found on Pregent's kitchen floor. Tr. IV-22 (Meinier). See Van Arsdall v. State, 486 A.2d 1, 5 (Del. 1984).

with a butcher knife.[7] Tr. X-52 (Van Arsdall). There was blood all over the Pregent kitchen, and a knife was sticking in the body. Tr. X-54-55 (Van Arsdall). Van Arsdall was knocked down in a scuffle with Pregent and almost fell on Epps' body. Tr. X-53-54 (Van Arsdall).

Thereafter, Pregent returned to his bed, and Van Arsdall walked across the second floor hallway and knocked on Fleetwood's apartment door. Tr. X-57 (Van Arsdall). Although there was no electricity in the Fleetwood apartment, Meinier estimated that approximately an hour or an hour and fifteen minutes after she had visited the Pregent apartment to check the time, she heard a knock on the outer apartment door. Tr. IV-17 (Meinier). When she opened Fleetwood's door, she saw a very tall man wearing a light blue shirt splattered with blood who carried a jacket. Tr. VI-17 (Meinier). From the appearance of his shirt, Meinier thought he "had a nose bleed" since the shirt " . . . wasn't full blooded, just splattered." Tr. IV-18 (Meinier).

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7 At trial on September 27, 1982, the State offered as State's Exhibit No. 75 a transcript of a January 1, 1982, tape recorded statement of Daniel Pregent, and as State's Exhibit No. 72, a tape recorded statement of Daniel Pregent of January 5, 1982. Tr. X-9, 13. In neither his January 1, 1982 tape recorded statement, nor the written transcript of the January 5, 1982 statement, did Daniel Pregent implicate his co-defendant Robert Van Arsdall in the Epps' homicide. Pregent denied committing the murder and in his two statements to the Smyrna Police Department speculated that Epps may have been killed in his apartment by a jealous boyfriend. As noted by the State of Delaware at footnote 13 on page 8 of its Petition for Writ of Certiorari, Pregent was acquitted of any criminal wrongdoing at a subsequent and separate trial. On September 30, 1982, the jury in Van Arsdall's first degree murder prosecution received a charge from the trial judge on accomplice liability. Tr. XII-15-16. Likewise, the prosecutor argued in his closing address to the jury on September 29, 1982, that Van Arsdall could also be convicted as an accomplice if Pregent committed all of the elements of first degree murder and possession of a deadly weapon during commission of a felony. Tr. XI-7. Defense counsel took exception to the trial court's giving any accomplice jury charge. Tr. XII-22-23.

Meinier recalled at trial that when Van Arsdall entered the Fleetwood apartment, he had bloody hands. Tr. IV-19 (Meinier). Van Arsdall also had a long serrated knife in his right hand, and Meinier recollected stating, "'That's a lethal weapon, Bobby. You better get rid of that because it's not safe . . . .'" Tr. IV-20 (Meinier). At that point, another occupant of the Fleetwood apartment, Mark Mood, stood up and took the knife from Van Arsdall. Tr. VI-20 (Meinier). Mood put the knife in the Fleetwood kitchen sink, and Meinier told Van Arsdall to wash his hands. Tr. IV-21 (Meinier).

Van Arsdall went into Fleetwood's bathroom to wash his hands as Meinier commanded, but when there was no water pressure, Meinier told him to wash in the kitchen sink. Tr. IV-21 (Meinier). While Van Arsdall was washing, Meinier testified that he told her, "' . . .there's something wrong across the hall . . . . '" Tr. IV-22 (Meinier). Meinier went to the Pregent apartment. Tr. IV-22 (Meinier). She opened the door slightly, the same lights were on as when she visited to check the time, and she could see someone lying in the kitchen with "a lot of blood all around." Tr. IV-22 (Meinier). After observing Epps' body, Meinier stated that she " . . . got a little hysterical I guess, and Bobby Van Arsdall held on to me and he said, 'It's all right' and I said, 'Well, the person might still be in there.'" Tr. IV-23 (Meinier).

Mark Mood then went all the way into the Pregent apartment, returned, and left the building. Tr. IV-24 (Meinier). Meinier estimated that it was approximately three or four minutes between when she first saw Epps' body in Pregent's apartment and Bruce Timmons of the Smyrna Police Department arrived at the outside door of the building. Tr. IV-24-25 (Meinier).

According to Van Arsdall, he and Meinier returned to Fleetwood's apartment and attempted to awaken Fleetwood. Tr. X-61-62 (Van Arsdall). When Van Arsdall and Meinier were back in the Fleetwood apartment, Officer Timmons went by the door. Tr. X-62 (Van Arsdall). While Van Arsdall and Meinier were standing by the sink in Fleetwood's apartment, Meinier told him to "Hide the knife, I think Bobby did it."[8] Tr. X-63 (Van Arsdall).

Bruce Timmons was the first policeman to enter Pregent's apartment. Tr. V-7 (Timmons). He checked Epps' vital signs, but she was dead. Tr. V-8 (Timmons). There was a great deal of blood on the floor. Tr. V-8 (Timmons). The bedroom area of the Pregent apartment was unlit, but with a flashlight, Timmons noticed a subject lying on the sofa bed wrapped in a blanket. Tr. IV-129 (Timmons). There was a large stain of what appeared to be blood next to the bed and on the bed. Tr. IV-130 (Timmons).

When Timmons went over to the bed and pulled away the covers, the individual on the bed " . . . started to come up. He was then pushed back down on the bed and handcuffed. . . ." Tr. IV-130 (Timmons). As Timmons took Pregent to the hallway, he noticed Corporal Howard Fortner of the Smyrna Police Department with Van Arsdall and Meinier. Tr. IV-133 (Timmons). While in the hallway, Timmons observed that Van Arsdall had what appeared to be blood stains on his clothing. Tr. IV-133 (Timmons). Timmons advised Fortner that Van Arsdall had blood on his clothing and told him to take Van Arsdall into custody as well. Tr. IV-134 (Timmons). Van Arsdall was handcuffed and

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8 Meinier's reference to "Bobby" was to Robert Fleetwood, not to the Defendant, Robert Van Arsdall. Tr. X-63 (Van Arsdall).

Fortner read his Miranda warnings. Tr. IV-134 (Timmons).

The Constitutional error which was the basis for the reversal of Van Arsdall's conviction by the Delaware Supreme Court in its November 19, 1984 Opinion[9] occurred on September 15, 1982, during the cross-examination of prosecution witness Robert Fleetwood on the third day of trial. Tr. III-69-88. After Fleetwood's direct testimony placing Van Arsdall in the Pregent apartment immediately prior to the Epps homicide [Tr. III-49-53 (Fleetwood)], defense counsel attempted to cross-examine Fleetwood concerning his possible bias or interest in testifing on behalf of the State. Tr. III-69-88 (Fleetwood).

When defense counsel attempted to cross-examine Fleetwood regarding his August 6, 1982 arrest on a charge of being drunk on the highway, the prosccutor at trial objected to the question. Tr. III-69 (Fleetwood). After a lenghty voir dire examination of witness Fleetwood outside the presence of the jury and the presentation of argument from legal counsel, the trial judge sustained the State's objection " . . . on the entire line of questioning." Tr. III-88.

At trial defense counsel was attempting to show that prosecution witness Fleetwood might have a possible bias or interest in testifying favorably to the State. Tr. III-69-88 (Fleetwood). Fleetwood was arrested on or about August 6, 1982, for the criminal offense of being drunk on the highway. Tr. III-71. When Fleetwood appeared in the Kent

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9 Now reported as Van Arsdall v. State, 486 A.2d 1 (Del. 1984).

County Court of Common Pleas on August 31, 1982,[10] Fleetwood and his attorney were able to strike a deal with the Delaware Attorney General whereby the criminal charge against Fleetwood would be dropped in exchange for his appearing the next morning at the Attorney General's office to discuss his upcoming testimony in the Van Arsdall prosecution. Tr. III-73 (Fleetwood).

The notice of nolle prosequi stated that the charge was dropped for "insufficient evidence" and was signed by D. C. Reed on August 31, 1982.[11] Tr. III-74. During the voir dire examination of prosecution witness Fleetwood outside the presence of the jury, Fleetwood responded to the prosecutor's question as to his understanding of why the criminal charge against him was dropped, as follows: "Well, I did understand that I did feel that you wanted to make sure that I knew what I was talking about, and I do feel that you wanted to make sure I had my story together before coming in here. So that is why I did feel that it was dropped."[12] Tr. III-76 (Fleetwood).

During oral argument to the trial judge, defense counsel stated that this issue of bias or interest cross-examination was controlled by the 1979 decision of the Delaware Supreme Court known as Wintjen v. State, 398 A.2d

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10 Robert Fleetwood was called as a prosecution witness in the Van Arsdall first degree murder prosecution on September 15, 15, 1982, approximately two weeks after his appearance in the Kent County Court of Common Pleas. Tr. III-40-90 (Fleetwood).

11 Prosecutor D. C. Reed was also the prosecuting attorney in the Kent County Superior Court homicide prosecution of Van Arsdall.

12 As indicated at footnote 16 at the bottom of page 9 of the State of Delaware's Petition for Writ of Certiorari, the Petitioner is not contesting the decision of the Delaware Supreme Court that the Kent County Superior Court committed error when it prevented Van Arsdall from questioning Fleetwood concerning the dismissal of his pending criminal charges.

780 (Del. 1979).[13] Tr. III-80. As a result of the trial judge's exclusion of the relevant bias cross-examination of prosecution witness Robert J. Fleetwood, defense counsel was prevented from showing the jury the factual basis for any potential bias or interest Fleetwood might have for testifying as he did against Van Arsdall. The importance of Fleetwood's testimony and why he was a significant prosecution witness in this case was his placing Van Arsdall at the Pregent apartment shortly before the Epps homicide [Tr. III-49-53 (Fleetwood)], and the use made by the prosecutor of Fleetwood's testimony[14] in cross-examining defendant Van Arsdall at trial. Tr. X-78 (Van Arsdall). During his cross-examination of Van Arsdall, the prosecutor asked the defendant if he went across the hall to Fleetwood's apartment after the Epps' homicide to kill Fleetwood. Tr. X-78 (Van Arsdall).

During closing argument, defense counsel pointed out to the jury that the prosecution presented sixteen witnesses and introduced seventy-five separate exhibits during nine days of testimony in an attempt to establish its circumstantial evidence case against Robert Van Arsdall.[15] Tr. XI-101-102. Defense counsel also noted in closing that there were no eyewitnesses to Van Arsdall committing any homicide and that the statement of Pregent was that he did

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13 Wintjen v. State, 398 A.2d 780 (Del. 1979) reversed various criminal convictions on the basis of a denial of bias cross-examination of a prosecution witness. The same Superior Court trial judge who presided in the Wintjen case also presided over this 1982 homicide prosecution of Robert Van Arsdall.

14 It must also be recalled that prosecution witness Alice Meinier denied that Fleetwood left his apartment after returning from the liquor store earlier that evening. Tr. IV-59 (Meinier).

15 Jury deliberations also extended over two days. See Van Arsdall v. State, supra, 5, for discussion of the circumstantial nature of the State's case.

not think Van Arsdall was involved. Tr. XI-109. A major assertion of the defense in closing argument was that if Van Arsdall had entered the Pregent apartment from the rear stairs unobserved by anyone except Pregent, why would Van Arsdall as a murderer or murder accomplice reveal himself to others by going across the hall with the bloody murder weapon and knocking on Fleetwood's apartment door. Tr. XI-96, 109.

Van Arsdall did not observe Fleetwood upon his return to the Pregent apartment, and Meinier denied that Fleetwood left his apartment at the time when Van Arsdall would have been present at Pregent's; thus, under these circumstances the highly provocative suggestion made by the prosecutor during his cross-examination of Van Arsdall[16] undercut Van Arsdall's entire defense. The homicide did not occur in Van Arsdall's residence, and the only other individual apart from Pregent (who did not suspect Van Arsdall of the homicide), who could place Van Arsdall at the scene immediately prior to the homicide was prosecution witness Robert Fleetwood.

SUMMARY OF ARGUMENT

I. The Delaware Supreme Court's utilization of a per se error rule governing total in limine prohibition of bias

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16 The prosecutor asked Van Arsdall on cross-examination if he went across the hall to kill Robert Fleetwood. Tr. X-78 (Van Arsdall).

cross-examination of a prosecution witness offering relevant testimony is consistent with the prior decisions of this Court. The Delaware Supreme Court clearly recognized that a harmless error analysis is appropriate in determining Constitutional Confrontation Clause violations when some cross-examination on the issue of bias or interest has been permitted. The Delaware Supreme Court has previously recognized that a harmless error standard may be employed when some cross-examination of a witness' bias or interest has been permitted. See Wintjen v. State, supra, 782; and Weber v. State, 457 A.2d 674, 682-83 (Del. 1983).

II. The Writ of Certiorari must be denied in this case because even under a harmless error analysis the error committed by the trial court was prejudicial and not harmless beyond a reasonable doubt. Robert Fleetwood was the only prosecution witness who placed Robert Van Arsdall at the homicide scene immediately prior to the crime. The prosecutor's poignant cross-examination of the accused at trial, suggesting that Van Arsdall only went across the hall to Fleetwood's apartment in order to kill Fleetwood and do away with a witness to his crime clearly establishes the important nature of Fleetwood's trial testimony. Even if it was improper to apply a per se error rule to a total in limine prohibition of bias cross-examination of a prosecution witness, no purpose will be served by reversing the decision of the Delaware Supreme Court and remanding this case for a determination if the error was harmless. Clearly, even under a Constitutional harmless error analysis, the error committed by the trial court was not harmless beyond a reasonable doubt. The facts of this case indicate that any reversal on a certiorari proceeding would

not result in a different decision from the Delaware Supreme Court regardless of whether a harmless or per se error rule is applied.

III. There is no need to hold this Petition during the pendency of U.S. v. Bagley, ___ U.S. ___, 105 S. Ct. 427 (1984). Bagley deals with an alleged Brady violation. It is factually distinguishable from the Van Arsdall jury verdict which was reversed by the Delaware Supreme Court.

ARGUMENT

I. THE USE OF A PER SE ERROR RULE UNDER THE FACTS OF THIS CASE IS CONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT.

Long ago this Court held that an in limine prohibition of cross-examination with respect to relevant evidence itself constituted prejudice and required reversal. Alford v. U.S., 282 U.S. 687, 694 (1931). The Delaware Supreme Court has done no more than that in ruling that " . . . a blanket prohibition against exploring potential bias through cross-examination . . . " constitutes per see error.[17] Van Arsdall v. State, supra, 7. Since Alford, this Court has consistently held that confrontation of witnesses through cross-examination is a fundamental right, the denial of which requires reversal. Davis v. Alaska, 415 U.S. 308 (1973); Smith v. Illinois, 390 U.S. 129 (1968); Brookhart v. Janis, 384 U.S. 1 (1965); Pointer v. Texas, 380 U.S. 400, 405 (1965); Greene v. McElroy, 360 U.S. 474 (1959); and District of Columbia v. Clawans, 300 U.S. 617, 632 (1937). Indeed, the right is so fundamental it has been analogized

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17 The State argues that the Delaware rule always requires automatic reversal and will never permit harmless error analysis of confrontation clause errors. Petition page 11, note 18. In fact, the Delaware Supreme Court has explicitly stated that improperly terminated cross-examination can be harmless. Wintjen v. State, supra, 782. See Beynum v. U.S., 480 A.2d 698, 707 (D.C. App. 1984), where the court applied a test identical to the Delaware rule. There the D. C. Court, finding that there was no in limine prohibition on bias cross-examination and sufficient cross-examination allowed from which the jury could infer bias, applied a harmless error test. The same kind of analysis would be permissible under the Delaware rule. Van Arsdall v. State, supra, 6-7.

to the effective assistance of counsel[18] Pointer v. Texas, supra, 403 [citing Gideon v. Wainwright, 372 U.S. 335 (1963)].

In Davis v. Alaska, supra, this Court held that denial of "the right of effective cross-examination" was "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Id., 318 (quoting Brookhart v. Janis, supra.). While not all confrontation clause violations may require evaluation under a per se error standard, it is clear that where the witness whose bias defendant sought to elicit provided a "link in the proof" against the defendant this court will utilize a per se error test. Davis v. Alaska, supra, 317.

If a witness' testimony is relevant to prove the existence of any fact tending to establish the defendant's guilt, the defendant must, as a matter of right, be afforded the opportunity to reveal the witness' bias to the jury.[19] In noting that "some topics will be of marginal relevance, and that the trial court may [then] properly prohibit cross-examination " [Van Arsdall v. State, supra, 6], the Delaware Supreme Court recognizes that if the testimony offered against the defendant was merely probative of some collateral issue or was not relevant to prove some element of the offense charged, cross-examination could properly be

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18 Can it be said that there is any relevant distinction between the right to effective assistance of counsel and the right to effective cross-examination? They are theoretically and practically co-extensive concepts in the law. It does the defendant little good to have a court-appointed attorney who is not permitted at trial to ask a prosecution witness about any deal he made with the prosecutor in exchange for his testimony.

19 This is of paramount importance in a case built entirely on circumstantial evidence. The relevant testimony of each prosecution witness in such a case is a link in the chain of evidence tending to prove the defendant's guilt. Van Arsdall v. State, supra, 5 ("The State relied on the circumstantial evidence outlined above.").

prohibited, presumably because the defendant's confrontation right would not have been violated in the first instance.

In finding the issue of bias to have been an "important issue before the court" [Van Arsdall v. State, supra, 7], the Delaware Supreme Court had already concluded that Fleetwood's testimony provided a "link in the chain" of evidence against Van Arsdall,[20] thus requiring the trial court to permit "inquiry into any acts, relationships, or motives reasonably likely to create bias." Van Arsdall v. State, supra, 6 (quoting Weber v. State, supra, 682).[21] Having found the testimony of the witness relevant (and, therefore, necessarily prejudicial), and that the defendant was prohibited from inquiring into the witness' bias, the Delaware Supreme Court simply declines to inquire into the relative extent of the prejudice and instead applies a per se error test. Van Arsdall v. State, supra, 7. Thus, the decision of the Delaware Supreme Court in ruling that an in limine prohibition of cross-examination on bias constitutes

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20 As must necessarily here be the case. In addition to placing Van Arsdall on the scene prior to the murder, the use to which the State put Fleetwood's testimony on cross-examination of Van Arsdall cut to the very heart of the defense.

21 The question also arises, as a matter of public policy, whether the State should be permitted to conceal from the jury a deal it has made in exchange for a witness' testimony by characterizing that testimony as "unimportant". Petition for Writ of Certiorari, page 8.

error per se is consistent with Davis.[22] Further, the Delaware rule is a practical one designed to assist trial courts in grappling with this issue during the heat of trial.[23]

A trial court is, thus, forewarned that some cross-examination on the issue of bias is constitutionally required and only after this threshold level has been met, does the trial court regain its broad discretion to limit the extent of cross-examination. Van Arsdall v. State, supra, 6; and Weber v. State, supra, 682.[24]

In fact, many of the lower court cases relied upon by the State reveal that even where a harmless error test was applied the trier of fact heard some testimony at trial from

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22 In fact, the situation in Van Arsdall where no bias cross-examination was permitted was worse than Davis v. Alaska, supra, where some bias cross-examination was allowed, or Smith v. Illinois, supra, where there was no complete denial of cross-examination.

23 The history of the development of the Delaware rule may in fact indicate that it was designed under the Delaware Supreme Court's supervisory authority to assist its trial courts. There have only been three cases in Delaware treating this issue. In Wintjen v. State, supra, 782, the court held that while some "improperly terminated cross-examination may be harmless error," it was reversible error for the trial court not to allow cross-examination on the issue of bias. In Weber v. State, supra, 682, while agreeing that under some circumstances a trial court may properly prohibit or limit cross-examination, the court set out a two-prong test requiring that some bias cross-examination be permitted sufficient for the jury to draw inferences as to the witness' reliability and from which counsel could argue bias. Finally, in Van Arsdall the Delaware Supreme Court made it crystal clear that some cross-examination on the issue of bias is constitutionally required and that the prohibition thereof will require reversal without regard to the "prejudicial impact" of the error. Van Arsdall v. State, supra, 7.

24 This Court has only recently reiterated that the rule in Davis v. Alaska, supra, requires some cross-examination be permitted to show bias and that no specific showing of prejudice is required if the defendant is thereby denied effective cross-examination. U.S. v. Cronic, ___ U.S. ___, 80 L. Ed.2d 657, 104 S. Ct. 2039 (1984); and U. S. v. Abel, 469 U.S. ___, 83 L. Ed.2d 450, 105 S. Ct. 465 (1984).

which it could infer the witness' bias.[25] Indeed, some of these cases explicitly state the rule that a trial court's discretionary authority to limit cross-examination only comes into play after the defendant has been permitted as a matter of right sufficient cross-examination to satisfy the confrontation requirement.[26]

The other lower court cases upon which the State relies in this Petition are factually different from this case in that they were not built entirely on circumstantial evidence and there was other "overwhelming" evidence against the defendant, mostly in the form of eyewitness testimony.[27] These cases, which Respondent believes, misapply Davis v. Alaska, supra, lead the State, by analogy, to the U. S. Supreme Court precedents cited to this Court by the State, which are inapposite to this case.

The State relies primarily on the application of Chapman v. California, 386 U.S. 18 (1967), to Bruton v. U.S., 391 U.S. 123 (1968), through Harrington v. California, 395 U.S. 250 (1969).[28] The State's argument is basically

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25 State v. Parillo, 480 A.2d 1349, 1358-59 (R.I. 1984); U.S. v. Gambler, 662 F.2d 834, 840 (D.C. Cir. 1981); Kines v. Butterworth, 669 F.2d 6, 13-14 (1st Cir. 1981), cert. cism'd., 421 U.S. 1006; Commonwealth v. Wilson, 407 N.E.2d 1229, 1246 (Mass. 1980); State v. Pierce, 414 N.E.2d 1038, 1043 (Ohio 1980); State v. Patterson, 656 P.2d 438, 440 (Utah 1982); Hoover v. State of Maryland, 714 F.2d 301, 305 (4th Cir. 1983); and Carrillo v. Perkins, 723 F.2d 1165, 1168, 1172 (5th Cir. 1984). Even in U. S. v. Duhart, 511 F.2d 7, 9 (6th Cir. 1975), cert. den., 456 U.S. 980 (1982) the defendant was otherwise able to cast doubt on the witness' testimony and otherwise impeach it.

26 State v. Parillo, supra; Ransey v. State, 680 P.2d 596, 597 (Nev. 1984); and Carrillo v. Perkins, supra.

27 U. S. ex rel Scarpelli v. George, 687 F.2d 1021 (7th Cir. 1982); Ransey v. State, supra; U.S. Duhart, supra; and People v. Boyce, 366 N.E.2d 914 (Ill. App. 1977).

28 Chapman, of course, was available to this Court when it decided Davis v. Alaska, supra, in 1974. If this Court wanted to apply a harmless error standard to the Davis case it could certainly have done so.

that since this Court applied Chapman to Harrington, where the witness was "totally immune from cross-examination,"[29] it should equally apply when the defendant has been prohibited from eliciting bias through cross-examination. The State overlooks two very important distinctions between Harrington and Davis. The first is factual.

Harrington was not a case built on circumstantial evidence. In fact, the Court found that the non-tainted evidence was overwhelming. Harrington v. California, supra, 254. There the defendant himself gave a statement, short of a confession, placing him with the other defendants in flight after the shooting. In each of the other cases upon which the State relies in this Petition the jury had before it, in addition to the tainted evidence, the voluntary confession of the defendant. Parker v. Randolph, 442 U.S. 62 (1979); Milton v. Wainwright, 407 U.S. 371 (1972); Schneble v. Florida, 405 U.S. 427 (1972); and Brown v. U.S. 411 U.S. 223 (1971). In Motes v. U.S., 178 U.S. 458 (1899), the defendant confessed at trial on the witness stand. In Parker the Court pointedly noted that the right of cross-examination "has far less practical value to the defendant who has confessed to the crime than to one who has consistently maintained his innocence." Parker v. Randolph, supra, 73.

In a case where the State has presented overwhelming independent evidence against the defendant and where the defendant has confessed, if this Court can conclude that there was no "reasonable possibility that the improperly admitted evidence contributed to the conviction" [Schneble v. Florida, supra, 432], the Court will not, under a harmless error standard, find reversal required. Thus, this

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29 Petition for Writ of Certiorari, page 16.

Court is loathe to conclude, even in the face of a Confrontation Clause challenge, that a confessing defendant could have been seriously prejudiced by his inability to cross-examine a confessing co-defendant. Yet, even in such a case if this Court could conclude that the case against the defendant would have been "significantly less persuasive had the testimony as to [the co-defendant's] admission been excluded" [Schneble v. Florida, supra, 432], the Court would reverse. However, this fact pattern did not appear in Davis v. Alaska, supra, nor does it appear here. The State's case here was wholly circumstantial and Van Arsdall who consistently maintained his innocence does not base his case upon the improper admission of any evidence.

The second distinction between Harrington and Davis involves the circumstances under which an appellate court may substitute its judgment for that of the jury. In Harrington and its' progeny, this Court has tried to judge the "probable impact" of improperly admitted testimony on the minds of the jury. Additionally, in those cases the witness' immunity from testimony, and, thus, cross-examination, was unavoidable for the trial court since the witness had asserted his right not to testify. Therefore, the jury could never under any circumstances have heard cross-examination on the issue of the non-testifying witness' bias.

In Davis, as here, the Court is dealing with the improper exclusion of evidence of bias of a testifying witness, which, but for the trial court's error, would have been heard by the jury who could have assigned it whatever weight they believed appropriate. In Davis, as here, the witness did not assert any right not to submit to cross-examination. Had the testimony been admitted, this issue would never have arisen on an appellate level. Here the

Court is being asked to speculate on the weight the trier of fact may have assigned to the evidence of the witness' bias had the jury been permitted to hear it. This Court has previously declined to engage in such speculation by invading the province of the jury, and should do so now. Davis v. Alaska, supra, 317.

II. THIS WRIT OF CERTIORARI MUST BE DENIED BECAUSE EVEN UNDER A HARMLESS ERROR ANALYSIS THE ERROR COMMITTED BY THE STATE TRIAL COURT WAS PREJUDICIAL AND NOT HARMLESS BEYOND A REASONABLE DOUBT.

The Delaware Attorney General argues that the decision of the Delaware Supreme Court must be reversed because a harmless, rather than per se, error rule is applicable. Presumably, if Fleetwood's testimony is only cumulative and this case is remanded to the Delaware Supreme Court with instructions to apply a harmless error standard, the convictions of Van Arsdall will be reinstated.[30]

The Delaware Supreme Court was correct in utilizing a per se error rule for this total in limine prohibition of relevant bias or interest cross-examination of a prosecution witness. Van Arsdall v. State, supra, 7. Furthermore, this Writ of Certiorari must also be denied because even if this Court is to determine that a harmless error rule must be utilized as a matter of federal law for violations of the Confrontation Clause of the Sixth Amendment to the United States Constitution, there will be no different result upon remand in this case. That is, Fleetwood was an important

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[30] See discussion at page 8, note 14 of Petition for Writ of Certiorari.

prosecution witness who placed the accused at the homicide scene immediately prior to the killing. Tr. III-49-53 (Fleetwood).

The statements of co-defendant Pregent also placed Van Arsdall at the Pregent apartment before the Epps murder, but Pregent's statements exonerated Van Arsdall. Thus, the only other witness in a case constructed entirely upon circumstantial evidence to the fact that Van Arsdall was even present at the scene before the homicide was Fleetwood.

The use made by the prosecutor at trial of Fleetwood's testimony was highlighted during the cross-examination of Van Arsdall. Here the prosecutor asked Van Arsdall the highly provocative question whether Van Arsdall had gone across the hall to kill Fleetwood. The suggestion made by the prosecutor was that Van Arsdall intended to kill the only detrimental witness placing him in the Pregent apartment before the homicide. Tr. X-78 (Van Ardsall) This suggested further homicidal intent of Van Arsdall was thwarted when Jane Meinier unexpectedly answered the door at the Fleetwood apartment and Van Arsdall also encountered Mark Mood, a third occupant of the Fleetwood apartment.

In closing argument, defense counsel asserted to the jury that the conduct of Van Arsdall after the homicide was not consistent with that of a murderer. Tr. XI-96 , 109. Van Arsdall entered the Pregent apartment from the back stairs late at night after all of the party guests left, with the exception of Pregent and Doris Epps, the victim. The homicide occurred in Pregent's apartment, and under such circumstances with Pregent not casting any blame upon Van Arsdall, it did not make sense for Van Arsdall not to leave by the same route he entered after witnessing the homicide committed by Pregent. Going across the hall to the

Fleetwood apartment carrying the bloody murder weapon was otherwise inexplicable if Van Arsdall was guilty of the crime.

Defense counsel argued to the jury at trial that it was unexplainable why a murderer would reveal himself under such circumstances. Tr. XI-96, 109. Nevertheless, the prosecution was able to undercut this defense theory by the skillful use of Fleetwood's testimony during cross-examination of the accused. Tr. X-78 (Van Arsdall) That is, the prosecutor's answer to the question why Van Arsdall went across the hall to the Fleetwood apartment carrying the murder weapon was because Van Arsdall intended to kill Fleetwood, a witness to his presence in the Pregent apartment before the homicide. In this sense, the testimony of Fleetwood was significant, and it cannot be said under such circumstances that the conceded error of the trial court[31] in not permitting relevant bias or interest cross-examination of this prosecution witness was harmless beyond a reasonable doubt.

This defense theory of why would a murderer reveal himself is particularly important in light of the other trial testimony of Jane Meinier, who claimed that Robert Fleetwood did not leave his apartment after returning from a second visit to a liquor store at approximately 8:00 or 9:00 p.m. on December 31, 1981. Tr. IV-59 (Meinier). Van Arsdall also did not state that he saw Fleetwood prior to the Epps homicide during his final visit to the Pregent apartment that evening.

Under the facts of this case, even if the requested relief of the State of Delaware is granted, the Delaware Supreme Court will still determine that the total in limine

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31 Page 9, note 16 of Petition for Writ of Certiorari.

prohibition against bias cross-examination of prosecution witness Fleetwood was not harmless error beyond a reasonable doubt. The only purpose to be served by granting certiorari in this instance would be to determine whether or not the rule of limited application adopted by the Delaware Supreme Court is Constitutionally permissible. In this respect, it should be noted that the Delaware Supreme Court readily acknowledges the applicability of a harmless error analysis in most Confrontation Clause cases involving a denial of bias cross-examination. Wintjen v. State, supra, 782; and Weber v. State, supra, 682-83.

The rule adopted by the Delaware Supreme Court is of relatively narrow application. Only when there is a total prohibition of relevant bias or interest cross-examination of a prosecution witness is a per se error rule to be applied. Van Arsdall v. State, supra, 6-7. If defense counsel is permitted some cross-examination on the issue of bias or interest of a witness sufficient to argue the issue to the jury, a harmless error rule is to be employed. See Chapman v. California, 386 U.S. 18 (1966).

III. THIS PETITION SHOULD NOT BE HELD PENDING A DECISION IN U.S. V. BAGLEY, NO. 84-48.

This Petition is distinguishable in several ways from U.S. v. Bagley, cert. granted, ____ U. S. ____, 105 S. Ct. 427 (1984). The Solicitor General in Bagley points out that the reliance by the Court of Appeals on Davis v. Alaska, 415 U.S. 308 (1974) was misplaced in that Davis involved a

restriction on cross-examination.[32] In Bagley the defendant was not restricted by the trial court from questioning witnesses. Therefore, the Solicitor General argues that Bagley should be decided on the issue of the "materiality" of the evidence withheld and not under the confrontation clause.

Factually there is even some question whether in Bagley payments by a government agency to commissioned state law enforcement officers for investigative services would have been relevant to prove bias. The witnesses were apparently reimbursed for out-of-pocket expenses incurred during their investigative services and, except for nominal witness fees, were not paid for their testimony.[33] Finally, unlike Van Arsdall, Bagley involves a unique situation where the trier of fact, the trial judge, was able to state beyond a reasonable doubt that had any testimony about payment of expenses been elicited at trial it would have been of no consequence to the outcome. As has been previously stated, in Van Arsdall, the State is asking this Court to announce a rule whereby a reviewing court would have to speculate upon the possible impact on a jury of improperly excluded bias evidence. There is, of course, no such requirement necessary to this Court's consideration of Bagley.

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32 The Solicitor General argues the this case should be decided under the principles laid down by this Court in U.S. v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963); and Kotteakos v. U.S., 328 U.S. 750 (1946), all cases involving the due process clause.

33 Also in Bagley the prosecutor was unaware the material evidencing the payments existed. Here the prosecutor was well aware of the deal he had made with Fleetwood.

CONCLUSION

On the basis of the various reasons and authorities cited herein, this Court must deny this Petition for Certiorari. Even under federal law the type and extent of the per se error rule for Confrontation Clause violations fashioned by the State Court is proper. Furthermore, even utilizing a harmless error rule will not result in a different disposition of this case after remand to the Delaware Supreme Court. Finally, it is unnecessary to hold this Petition for Certiorari pending any decision in U.S. v. Bagley, No. 84-48, inasmuch as that is a case involving a denial of Brady material and is factually inapplicable to the Constitutional Confrontation Clause issue present here.

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Dated: March 8, 1985

No. 84-1279

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF DELAWARE,
Petitioner

v.

ROBERT E. VAN ARSDALL,
Respondent

On Petition For Writ Of Certiorari
To The Supreme Court Of Delaware

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

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STATE OF DELAWARE,
Petitioner

v.

ROBERT E. VAN ARSDALL,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF DELAWARE

The State of Delaware, the petitioner, is acutely aware that this Court does not sit to correct every error committed by the State and lower federal courts in their application of settled constitutional principles and that institutional limitations make this Court reluctant to undertake its own review of a trial record to determine the harmlessness of the error in all cases in which the prosecutor advances that conclusion. This petition asks this Court to do neither of those tasks. Rather, it only asks this Court to free the prosecution from the shackles of the principle of automatic reversal, mistakenly conceived as a federal constitutional imperative by the court below, so that it may carry its burden of demonstrating that the Confrontation Clause error was harmless.

Secondly, Delaware believes that, in light of the position now advanced by the Respondent, common sense fairness requires that this petition be granted.

Reasons for Granting the Writ

1. Respondent Has Changed His Position

Van Arsdall does not dispute that the state and lower federal courts have given various inconsistent answers to the question of the appropriate interplay between the cross-examination guarantee announced in *Davis v. Alaska*, 415 U.S. 308 (1973) and the principle of constitutional harmless error. Brief in Opposition at 18-19 & nn. 25-27.[1] Moreover, he acknowledges that other jurisdictions have rejected the rule of automatic reversal, pioneered by the Ninth Circuit and now adopted, in an expansive form, by the Delaware court below.[2]

Van Arsdall argued vehemently to the court below that the Confrontation Clause required a rule of automatic reversal for erroneous restrictions on "bias" cross-examination of *any* prosecution witness, without any in-

1. The confusion is best demonstrated by other courts' reactions to the purported two-tiered review process utilized by the Delaware court. It has been criticized as conflicting with *Davis*. *Carillo v. Perkins*, 723 F.2d 1165, 1171 (5th Cir. 1984). Moreover, its total/partial prohibition dichotomy has led to uneven application. For example, where the prosecution witness has been asked if he had made a "deal" with the prosecutor, but the defendant has been precluded from eliciting evidence that criminal charges have been dismissed, the courts have reached differing results. *Compare Carillo*, 723 F.2d at 1171-72 (error was partial restriction so harmless error analysis available) *with State v. Parillo*, 480 A.2d 1349, 1357-58 (R.I. 1984) (error was *in limine* total prohibition requiring automatic reversal).

2. *United States v. Duhart*, 511 F.2d 7, 9 (6th Cir.), *cert. dismissed*, 421 U.S. 1006 (1975) (total exclusion of evidence of criminal charges pending against witness was harmless error); *Ransey v. State*, 680 P.2d 596, 597-98 (Nev. 1984) (total exclusion of evidence of witness' racial prejudice was harmless error).

quiry into the content and prejudicial effect of the not fully impeachable testimony. Reply Brief for Appellant (Robert E. Van Arsdall) at 10-17, *Van Arsdall v. State*, 486 A.2d 1 (Del. 1984) ("it is equally clear that in *Davis v. Alaska*, the United States Supreme Court . . . held that a denial of the right of cross-examination is a deprivation of a right so fundamental that it always requires reversal."). The opinion below tracked both the structure and language of Van Arsdall's argument.

Now, contrary to his position below, he implicitly concedes that harmless error analysis, keyed to whether the witness' testimony provided a "crucial link in the proof" of the crime, *Davis*, 415 U.S. at 317, is indeed appropriate. Brief in Opposition at 16-17.[3] To avoid the necessary implication of this change of position, he asserts that the court below ignored its own conclusion that, in light of the erroneous restriction, "the actual prejudicial impact of such an error [would] not be examined and reversal is mandated," Pet. App. at A-7, and, instead, it silently determined the impact of Fleetwood's direct testimony in the context of the entire trial record. Brief in Opposition at 16-17. Any reasonable reading of the opinion of the Delaware court belies Van Arsdall's assertion of such a silent evaluation.[4]

3. Pointedly, in an effort to have some foundation for the position he asserted below, Van Arsdall omits the modifier "crucial" in his recitation of the *Davis* quotation.

4. Van Arsdall, to show this evaluation of the impact of the testimony, relies on the court's quotations that "some topics will be of marginal relevance and that the trial court in such situations may properly prohibit cross-examination or allow only limited questioning," Pet. App. at A-5, quoting *Weber v. State*, 457 A.2d 674, 682 (Del. 1983) and "[t]he question of bias was an important issue before the court." Pet. App. at A-5. When read in context, it is obvious that the statements are references to whether the proffered impeachment evidence was probative of bias and not an evaluation of the prejudicial effect of the not fully impeached direct testimony. Indeed, Van Arsdall recognized the thrust of the quoted material below. Reply Brief of Appellant (Robert Van Arsdall) at 14, *Van Arsdall*

Unless this Court is convinced that the automatic reversal rule crafted by the Delaware court correctly flows from the Confrontation Clause, a fundamental sense of fairness suggests that this petition be granted.[5] If review is denied, Van Arsdall will have succeeded in overturning his convictions on the basis of a legal principle, automatic reversal, which he now implicitly recognizes is erroneous. Such tactics threaten the very societal and jurisprudential values which underlie the harmless error doctrine.[6]

2. No Manifest Harm Exists

In an effort to preclude scrutiny of the rule of automatic reversal that he foisted on the Delaware court as a constitutional imperative, Van Arsdall suggests that review must be denied because even if such a rule was erroneous, the court below would have unquestionably found the restriction as not harmless beyond a reasonable doubt. As his solitary support for that assertion, he argues that the prosecutor used, in a damaging fashion, Fleetwood's testimony by asking Van Arsdall on cross-examination whether he had gone across the hall to kill

NOTES *(Continued)*

(after referring to the quote from *Weber*, stating that "such a prohibition on cross-examination, however, only has application to the evidence proffered to prove bias, not to the evidence offered on direct examination of the witness").

5. "[J]ustice, though due the accused, is due the accuser also. The concept of fairness must not be so strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

6. It is no answer, as Van Arsdall suggests, that the automatic reversal rule is itself harmless. Brief in Opposition at 25. Van Arsdall's belated change of position will not remove the automatic reversal rule from federal constitutional jurisprudence in Delaware. Secondly, any retrial of Van Arsdall would require witnesses, if presently available, to recollect events occurring three years ago. Finally, if the first trial was not unfair, a second trial offers gratuitously to Van Arsdall the possibility for additional errors, threatening to prolong interminably this litigation.

Fleetwood. Brief in Opposition at 23-24, referring to Tr. X78 (Van Arsdall). As shown by that portion of the prosecutor's cross-examination, reproduced at D-1 in the Appendix to this Reply Brief, the record does not support his assertion.

First, in that cross-examination, the prosecutor did not refer to Fleetwood's testimony. Secondly the supposedly devastating "provocative question" sprang not from any of Fleetwood's testimony but from Van Arsdall's response to a question posed just moments before. There, the prosecutor asked Van Arsdall if he knew who was across the hall when, after the murder, he carried the knife to Fleetwood's apartment. Van Arsdall responded that "[a]ll I know, Fleetwood was across there." App. D-1. The impetus for the following question concerning killing Fleetwood came from Van Arsdall's own admission he knew Fleetwood was in his apartment.[7]

Finally, the theory of the prosecution now offered by Van Arsdall in an effort to make an error harmful was never mentioned to the jury. In fact, the prosecutor told the jury in his summation that the evidence did not reflect why Van Arsdall had gone across the hall. Indeed, the prosecutor never referred to Fleetwood's testimony in his opening statement and mentioned it, only in passing, in his closing argument. Van Arsdall's make-weight assertion of manifest harm should not be allowed to preclude this Court from scrutinizing the automatic reversal rule.

7. Fleetwood did not testify that Van Arsdall had seen him when he glanced into Pregent's apartment near 11:30 p.m.

Conclusion

With the continuing confusion of the lower courts, and particularly in light of the positions now advanced by the Respondent, this petition should be granted and the rule of automatic reversal for Confrontation Clause errors be overturned.

March 15, 1985 Respectfully submitted,

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APPENDIX

APPENDIX D

Excerpts of Trial Transcript Volume X at 78-79
Cross Examination of Robert Van Arsdall

[78]

. . .

(Prosecutor) Q. You said you took the knife across the hallway when you took it away from Pregent to have something to defend yourself?

(Van Arsdall) A. Yes.

Q. Are you sure when you did that Pregent wasn't in the bathroom in his apartment washing up?

A. Yes, I am sure.

Q. Do you know when he washed up, if he did?

A. I don't know when he washed up really.

Q. Did you know who was across the hall?

A. All I know, Fleetwood was across there.

Q. When did you last see him?

A. The second time I was there.

Q. What was he doing at that time?

A. He was drinking.

Q. That's all you thought was across the hall was Fleetwood?

A. Yes.

Q. Are you sure you didn't go across the hall to kill him?

A. Yes, I'm sure.

[79]

Q. How did you carry the knife across the hall when you went in there?

A. Carried it loosely in my hand.

Q. Just holding it out?

A. The blade was like this (indicating). Just loosely in my hand.

Q. Were you displaying the knife when you went in?

A. I just walked in there casually with it.

Q. You walked in there casually with it?

A. Sort of.

Q. What do you mean sort of casually with the knife?

A. I had it hanging down. My arm was hanging loose.

Q. Were you holding it by the blade or by the handle?

A. Partially blade, partially handle.

Q. Sort of in the middle there then?

A. Yes.

Q. Were you trying to hide it —

A. No.

Q. — as you went in there?

A. No, I was not.

In The

Supreme Court of the United States

October Term, 1984

STATE OF DELAWARE,
Petitioner,

v.

ROBERT E. VAN ARSDALL,
Respondent.

On Writ of Certiorari to
the Supreme Court of Delaware

JOINT APPENDIX

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Petition For Certiorari Filed February 7, 1985
Certiorari Granted July 2, 1985

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RELEVANT DOCKET ENTRIES IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

State of Delaware v. Robert E. Van Arsdall
Crim. Action Nos. IK82-01-0073, 0074

January 1, 1982	Arrested; warrants issued through Justice of the Peace Court No. 7. Committed without bail on first degree murder; committed in lieu of $5,000 secured bond on possession of a deadly weapon during the commission of a felony.
January 26, 1982	Preliminary hearing, Court of Common Pleas of the State of Delaware in and for Kent County.
March 1, 1982	True bill.
March 12, 1982	Arraignment. Defendant waived reading of indictment. Pled not guilty. Jury trial requested.
September 13, 1982 through October 1, 1982	Jury trial and deliberations before William G. Bush, III, J. Guilty of first degree murder and possession of a deadly weapon during the commission of a felony. Pre-sentence investigation ordered.
October 29, 1982	Sentencing before William G. Bush, III, J.: IK82-01-0073 (first degree murder)—To be imprisoned for a period of life, beginning January 1, 1982, without eligibility for probation or parole. IK82-01-0074 (possession of a deadly weapon during the commission of a felony)—Pay costs of prosecution (suspended); to be imprisoned for a period of thirty years,

consecutively to the sentence in IK82-01-0073, without eligibility for probation or parole during the first five years of this sentence. Defendant to be delivered to the Department of Corrections.

RELEVANT DOCKET ENTRIES IN THE SUPREME COURT OF DELAWARE

Robert E. Van Arsdall v. State of Delaware
No. 346, 1982

November 4, 1982	Notice of appeal filed.
October 31, 1983	Brief for Appellant (Robert E. Van Arsdall).
February 29, 1984	Brief for Appellee (State of Delaware).
September 10, 1984	Argument before Justices John J. McNeilly, Andrew G.T. Moore, II, and Andrew D. Christie.
November 19, 1984	Opinion, Christie, J., reversed and remanded.
December 4, 1984	Motion of Appellee for rehearing en banc.
December 12, 1984	Order, Christie, J., motion for rehearing en banc denied.
December 14, 1984	Record and mandate to Prothonotary, Kent County. Case closed.
December 28, 1984	Corrected page 6 of November 19, 1984 opinion issued.

JUDGMENTS AND DECISIONS IN QUESTION

The opinion of the Delaware Supreme Court dated November 19, 1984 is officially reported at 486 A.2d 1 and is printed in the Appendix to the Petition for Writ of Certiorari at A-1 through A-23. The December 12, 1984 order of the Delaware Supreme Court denying the State of Delaware's motion for rehearing en banc is printed in the Appendix to the Petition for Writ of Certiorari at B-1.

TRANSCRIPT OF STATE'S EXHIBIT 72, STATE OF DELAWARE v. ROBERT E. VAN ARSDALL, Crim. Action Nos. IK82-01-0073, 0074, SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

[1][1] It is now 1333 hours. Present are Chief McGinty, Daniel Pregent and myself, Detective Bowers. The date is 1-5-82. [*Miranda* warnings and waiver deleted.]

Bowers: Do you wish to make any statement in reference to the statement you just heard?

Pregent: Not in reference to the statement I heard. I believe everything I said in all statements up to now are to the best of my ability. I think I am perfectly okay. I am still sticking by everything I said. I don't want to change anything I said.

Bowers: In other words, you are saying that you didn't commit the act of murder nor did you have anything to do with it.

McGinty: Nor do you know anything about it?

Pregent: Nor do I know anything about it.

Bowers: Then, why was it you stated that you were wrapped up in a blanket, the body must have been dragged across you. There was no blood on the blanket whatsoever.

[2] Pregent: When I was woken up, I didn't even notice any blood anywhere. I was still groggy. I didn't notice

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[1]The tape recording, State's Exhibit 72, was introduced into evidence at Vol. X, pg. 9 of the trial transcript. The transcript of the tape was not admitted into evidence, but counsel for petitioner and respondent stipulate that it is an accurate transcript of the tape.

anything until I was out in the hallway. The first I saw of it was when I looked back in and saw part of it.

McGinty: How do you explain the fact that when the officers recovered you from that bed in the bedroom you were covered up with a blanket and there was absolutely no blood on the blanket? However, on your trousers there were stains that appeared to be blood? How do you explain that?

Pregent: I can't.

McGinty: Your statement is that you were in that bed and you have no knowledge of anything that went on in that apartment?

Bowers: Even as far as any sex acts by you or Vanarsdale?

Pregent: That is right.

Bowers: You don't know of any sex act that was performed?

Pregent: None at all.

Bowers: So you do not wish to make any other statement?

Pregent: If you have any other questions to ask me, I will answer them.

Bowers: When Van Arsdall came to your apartment, did you meet him in the street or did he . . .

Pregent: I first met him in the street and he had other business to attend to so I showed him the back way to the apartment up the steps, so he didn't have to go banging on the front door. It would be easier to go right

up to the apartment so I showed him that way and later on in the evening, a couple of hours or so, he came back up.

[3] Bowers: About what time was this when you first saw him?

Pregent: It was still daylight, so it was probably before 5:00. Probably about approximately 4:00 or 5:00.

Bowers: What time did he get to your apartment when he came back?

Pregent: After dark, maybe—this is all approximate, I wasn't wearing no watch—maybe 6:30 or so.

Bowers: Did he leave between then and the time you were awakened by the police?

Pregent: He might have, I didn't keep track of everybody's comings and goings.

Bowers: Do you remember when Crain left?

Pregent: Vaguely.

Bowers: Was Van Arsdall there then?

Pregent: He might have been, like I said, I didn't keep track of people. We were visiting next door to talk and it wasn't just a thing where everybody just sat down and stayed there. We were moving around.

Bowers: So you don't want to make a statement in reference to Van Arsdall and the murder or you and the murder?

Pregent: No, because I don't know if he did it or not. I don't think he did. Because I have known him for a

while and I never saw any indication that he would do anything like that. He has been a friend of mine so I can't say anything against him.

Bowers: You don't think he did it?

Pregent: No, I don't.

[4] Bowers: Who do you think did it?

Pregent: Who I think did it—I think it was somebody that knew her like maybe a jealous boyfriend or something like that.

Bowers: How would he have gotten into your apartment?

Pregent: I am not sure if the back door was locked or not. I didn't secure the place like I should have. I laid down and went to sleep.

Bowers: Van Arsdall claims he got there about 11:30. He stated that you were the one that drug the body across him.

McGinty: He also stated that he attempted to stop you and when he did he was struck by you.

Pregent: I can't account for that statement.

McGinty: You are saying that you don't know whether you struck him, you don't know whether you committed this crime?

Pregent: I am sure that I didn't. For one reason, my hand has started to get better and I can almost make a complete fist now. A couple of days before that, I had gotten angry—I have a brick wall in my apartment—I figured I couldn't hurt it so I hit it with my right hand.

McGinty: You struck a brick wall?

Pregent: Yes, I did.

McGinty: Do you often have fits of rage like that and strike walls?

Pregent: No, not very often.

McGinty: Not very often, but it does happen?

Pregent: Occasionally I get mad and I feel like hitting something like any other normal human being.

[5] McGinty: Would you say that this is the practice of a normal human being to strike a wall?

Pregent: In the process of aggravation, people have been known to throw things and stuff like that. I don't consider it right, but I would see it as normal.

McGinty: It is a practice of yours?

Pregent: Not very often—maybe once every couple of years or something.

STATE'S EXHIBIT 73, STATE OF DELAWARE v. ROBERT E. VAN ARSDALL, Crim. Action Nos. IK82-01-0073, 0074, SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

[1][2] I am Detective Carlton Bowers of the Smyrna Police Department. Present is Chief Donald McGinty and one Robert Van Arsdall. The time is 0653 hours, the date 01-01-82. This is reference to a homicide which occurred this date. [*Miranda* warnings and waiver deleted.]

Bowers: Robert, where were you earlier this morning?

Van Arsdall: I was at a New Year's Eve Party, I stopped up there.

Bowers: New Years party where?

Van Arsdall: No special place, we were just riding around.

Bowers: Who is we?

Van Arsdall: Me and a couple friends of mine.

Bowers: Who are they? Do you know their names?

Van Arsdall: Yes, I know their names but I don't want to get them involved. They had nothing to do with it.

Bowers: After you were riding around, what happened then?

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[2]The transcript is admitted into evidence at Vol. X, pg. 12 of the trial transcript. The actual tape, State's Exhibit 28, was introduced into evidence at Vol. VII, pg. 84 of the trial transcript.

Van Arsdall: I got tired and told them to drop me off at Danny's, I was going to sack out. I got to Danny's and I talked a little while. I laid down. A little while later, I felt like I was going to be sick [2] so I went out into the hallway to get some air and there was this one lady across the hall.

Bowers: What lady was that?

Van Arsdall: I don't know what her name was. It was a blonde haired lady. Then I came back in and saw that and then I got sick.

Bowers: How long were you out in the hall?

Van Arsdall: I really don't know. I lost my watch sometime last night.

Bowers: What type of watch was it?

Van Arsdall: Timex.

Bowers: Have any idea where you lost the watch?

Van Arsdall: No I don't. I lost it somewhere last night.

Bowers: Who was at Danny's apartment when you arrived?

Van Arsdall: There was someone asleep on the bed.

Bowers: He didn't say who it was?

Van Arsdall: No he didn't.

Bowers: Did you see that person asleep on the bed?

Van Arsdall: There was someone on the bed. I couldn't tell who it was. It was too dark, I couldn't get a look.

Bowers: You don't know if it was a male or female?

Van Arsdall: No I don't .

Bowers: You said you wanted to take a nap. Where did you take a nap at?

Van Arsdall: He had the cushions from the sofa down on the floor. That's where I laid down at.

Bowers: Floor in what room?

Van Arsdall: In the same room.

[3] Bowers: The bedroom?

Van Arsdall: Yeah.

Bowers: Is this where Danny and this person was asleep?

Van Arsdall: Yeah.

Bowers: Was there anyone else in the apartment?

Van Arsdall: Not that I know of.

Bowers: Did you eat anything earlier that night at that apartment?

Van Arsdall: I had some spaghetti and pork chops.

Bowers: Who fed that to you?

Van Arsdall: Danny gave that to me.

Bowers: Was there anyone else there at the time?

Van Arsdall: There was some other people there.

Bowers: Such as.

Van Arsdall: No reply.

Bowers: You don't know who they were?

Van Arsdall: I know who they were but I don't want to get them involved in this.

Bowers: Why don't you want to get them involved?

Van Arsdall: Because they're friends of mine.

Bowers: You're involved.

Van Arsdall: I know I'm involved but I didn't have a God damned thing to do with it.

Bowers: You didn't have anything to do with what?

Van Arsdall: Whoever did that shit to whoever it was in there.

Bowers: What was done? What did you see?

[4] Van Arsdall: I went in there and I got blood all over me. I went in there to see what I could do for the lady and her heart was still pumping and it got blood all over me. I kneeled down beside her and that's when her heart stopped.

Bowers: What did you see when you went in there?

Van Arsdall: Gross.

Bowers: Describe it to me.

Van Arsdall: Her stomach was cut open. Half her guts was hanging out. A damn pool of blood was all over the damn place.

Bowers: So why didn't you contact the police?

Van Arsdall: I hollered for somebody to call the police.

Bowers: You did?

Van Arsdall: Yeah.

Bowers: Did anyone go for the police?

Van Arsdall: I believe so.

Bowers: Who went?

Van Arsdall: There was somebody out in the hall when I hollered to get the police and I believe they went and called you guys.

Bowers: Did you have a knife earlier this evening?

Van Arsdall: No sir.

Bowers: You didn't have a knife at all?

Van Arsdall: No—unintelligible.

Bowers: How did you get so much blood on your clothes?

Van Arsdall: I went in to see what I could do for the lady and her heart was still beating and blood was flowing that's where. That is how it got all over my clothes. I knelt down beside her and blood was all over the damned floor.

[5] Bowers: Was there anyone else in the apartment when you went in there?

Van Arsdall: I'm not sure there was. I believe Danny was still asleep on the bed. I'm not sure.

McGinty: You stated earlier that you were in there asleep and you got up and felt sick and you went out in the hall?

Van Arsdall: Yeah

McGinty: What time was that?

Van Arsdall: I don't know.

McGinty: How long were you out in the hall?

Van Arsdall: I really don't know, I lost my watch.

Bowers: Where did the scratches come from on your left arm?

Van Arsdall: Where?

Bowers: On your left arm?

Van Arsdall: No reply.

Bowers: Around your tatoo, right on your forearm?

Van Arsdall: There's no scratches, that's part of the tattoo.

Bowers: That red is part of the tattoo?

Van Arsdall: Yes it is, that's coloring.

Bowers: Where did the bruises come from on your knuckles?

Van Arsdall: Well I was playing with the cat, he has a cat up there. I was playing with the cat.

Bowers: The cat put bruises on your knuckles?

Van Arsdall: I don't have no bruises on my knuckles.

Bowers: Your knuckles are bruised.

Van Arsdall: No they're not.

[6] Bowers: I say they are.

Van Arsdall: I don't see no bruises on my knuckles. All I see are scratches from the cat.

Bowers: Is that where the scratches came from?

Van Arsdall: Yeah.

Bowers: Did you see anybody by the name of Fleetwood?

Van Arsdall: He was in the other apartment. He was passed out on the couch.

Bowers: Who else saw you, he didn't see you so who else saw you. He was passed out. Did you see anybody by the name of Doris?

Van Arsdall: All I know is that a blond haired lady was there.

Bowers: What was her name?

Van Arsdall: I don't know her name.

Bowers: You don't know her name?

Van Arsdall: No I don't.

Bowers: There was only one lady up there?

Van Arsdall: Just one.

Bowers: That's all you saw? What apartment was she in?

Van Arsdall: Same one as Fleetwood was in.

Bowers: She was in Fleetwood's apartment?

Van Arsdall: Yeah, she came to the door.

Bowers: You didn't see her in another apartment at all?

Van Arsdall: No.

Bowers: See a guy by the name of Bobby?

Van Arsdall: Yeah, Bobby Fleetwood.

[7] Bowers: Another guy by the name of Bobby, a black guy?

Van Arsdall: Unintelligible.

Bowers: Were there any black guys up there?

Van Arsdall: There was a couple.

Bowers: But you didn't know who they were? Did you see a lady named Ida Mae up there?

Van Arsdall: She was there earlier, way earlier.

Bowers: Isn't it true that you did talk to that lady that was killed earlier this morning?

Van Arsdall: I don't even know who she was.

Bowers: Her name was Doris, a black lady. Witnesses said that you did talk to her.

Van Arsdall: I said, how are you. She said, fine.

Bowers: That was it? So you saw her before she went to sleep?

Van Arsdall: I saw her earlier.

Bowers: What was she doing earlier?

Van Arsdall: I believe she was doing something in the kitchen. Unintelligible.

Bowers: Earlier Robert, you said you didn't see her.

Van Arsdall: Hmm?

Bowers: Earlier in this statement you said that you didn't see her.

Van Arsdall: What statement?

McGinty: The one you are giving right now.

Van Arsdall: You guys are trying to confuse me.

Bowers: We are not trying to confuse you, just asking questions.

Van Arsdall: The hell you ain't.

[8] Bowers: We are just asking questions Robert. Did you have sex with anyone this evening?

Van Arsdall: No sir.

Bowers: None at all?

Van Arsdall: No sir.

Bowers: Did you have a fight with anyone this evening?

Van Arsdall: No.

Bowers: No fight at all?

Van Arsdall: No.

Bowers: You didn't tell anyone at the party that you were in a fight?

Van Arsdall: No.

Bowers: How did you explain the blood on your clothes then when they saw you?

Van Arsdall: I just told them there was somebody over there dead.

Bowers: When you went to help her, in what manner did you do it? You said as soon as you got over there to her, her heart quit beating.

Van Arsdall: I knelt down.

Bowers: Would you show us how you knelt down?

Van Arsdall: I knelt down beside of her.

Bowers: In what manner?

Van Arsdall: I don't remember exactly in what manner I knelt down. I just know I was getting blood all over me. When I picked up her hand to get a pulse her heart stopped. That's all I know. She was dead.

Bowers: Then what did you do after that?

Van Arsdall: I hollered for somebody to call the police and I just flew out of the apartment.

[9] Bowers: I asked you a question earlier in reference to a knife. You don't recall having a large knife earlier this evening?

Van Arsdall: No I don't.

Bowers: Had you been drinking earlier this evening or this morning?

Van Arsdall: I had been drinking a little bit that evening.

Bowers: How much did you have to drink?

Van Arsdall: Quite a bit.

Bowers: How much is that, approximately?

Van Arsdall: I don't know approximately.

Bowers: Were you drinking beer, liquor or what?

Van Arsdall: A little of both.

Bowers: Did you do any drugs this morning?

Van Arsdall: No.

Bowers: You don't do drugs? You don't smoke pot?

Van Arsdall: Once in a while.

Bowers: You didn't smoke any this morning?

Van Arsdall: No, I didn't smoke.

Bowers: I was told that you did smoke pot this morning.

Van Arsdall: No.

Bowers: You don't recall?

Van Arsdall: I know damned well I didn't.

Bowers: Have you ever seen the lady before this morning that was killed?

Van Arsdall: No.

Bowers: You've never seen her before? This morning was the first time?

Van Arsdall: Yes.

[10] Bowers: Did she know you?

Van Arsdall: No.

Bowers: Did you make a statement this morning to someone in reference that you did assault somebody?

Van Arsdall: No.

Bowers: You didn't at all? I have two witnesses who said you did.

Van Arsdall: What two witnesses?

Bowers: They said you had got in a fight.

Van Arsdall: No.

Bowers: Would you roll both of your sleeves up Robert?

Van Arsdall: The only scratches I've got is from the damned cat.

Bowers: Turn your arms the other way. You don't recall w[illegible] you lost your watch?

Van Arsdall: No I don't.

Bowers: When was the last time you saw the watch?

Van Arsdall: Well I guess it was around 10:30 or 11:00, I believe.

Bowers: Where were you prior to that?

Van Arsdall: I was at a friend's house. Stopped at a friend's house.

Bowers: Here in town?

Van Arsdall: No.

Bowers: What time did you go to the party up there at Danny's house?

Van Arsdall: That was earlier.

Bowers: What time was that?

[11] Van Arsdall: About 4:30 to 6:00.

Bowers: You were there from 4:30 up until the time the police got there?

Van Arsdall: No I left. Unintelligible.

Bowers: What time did you leave?

Van Arsdall: About 6:00.

Bowers: You came back at what time?

Van Arsdall: It was after I left my friend's house. I had to walk all the way.

Bowers: So what time did you get back to Danny's?

Van Arsdall: It must have been close to 12:00 I belive.

Bowers: You went straight to Danny's apartment when you got there or did you go to Fleetwood's apartment?

Van Arsdall: I went straight to Danny's. I went up the back way.

Bowers: Who let you in the back way?

Van Arsdall: Danny did.

Bowers: He was up when you got there?

Van Arsdall: Uh huh.

Bowers: Where was the lady at when you got there?

Van Arsdall: Whoever it was, I think she was in bed. I know there was somebody in the bed.

Bowers: How did you know that?

Van Arsdall: I could see somebody laying there. I don't know who it was or anything. I could just see somebody lying there.

McGinty: When you got back there to their house, you say you saw somebody laying on the bed. What did you do then?

[12] Van Arsdall: Danny and I talked for a while.

Bowers: Where were you when you were talking?

Van Arsdall: Out in the kitchen. I asked him if I could make myself a couple of peanut butter sandwiches and he said yes.

Bowers: So this person was still in bed then?

Van Arsdall: As far as I know.

Bowers: Was the sofa bed open or closed?

Van Arsdall: It was open.

Bowers: It was open when you got there.

McGinty: After you made the sanwiches, what did you do then?

Van Arsdall: I went in the bedroom. I laid on the sofa cushions. He sat on the corner of the bed and we talked a while then he crashed out. I laid there for a while and thought I was going to be sick so I went out to get some air.

McGinty: When you went out to get some air, where did you get some air?

Van Arsdalll: I just walked up and down the hall.

McGinty: Up and down the hall?

Van Arsdall: Yeah. Then this blonde haired lady, she came out and seen me walking up and down the hall.

McGinty: She cam[illegible]ut of where?

Van Arsdall: Fleetwood's apartment. I believe she wanted to see Danny or something but I told her he was asleep but she went to the door and opened it up.

McGinty: She went to the door and opened it up. Where were you then?

[13] Van Arsdall: I was standing right there behind her. I was ready to go back in. I was feeling better then.

McGinty: Then what did you do?

Van Arsdall: Started to get sick again. That's when I went in to see what I could do for her and had a time getting the blonde haired woman to calm down.

McGinty: What was she doing?

Van Arsdall: She was getting hysterical.

McGinty: You went in to see what you could do for her and then what?

Van Arsdall: That's when I got the blood all over me. I come back out and the blonde haired lady, she was still hysterical. I was trying to keep her calm. Trying to get Bobby Fleetwood up but he wouldn't get up.

Bowers: Why were you trying to get him up for?

Van Arsdall: She wanted him up.

McGinty: Were you in Fleetwood's apartment then?

Van Arsdall: Yeah at the time.

Bowers: How did you know it was Fleetwood laying on the sofa?

Van Arsdall: Because I went to school with him.

Bowers: There was no electric in that apartment. It had to be totally dark.

Van Arsdall: Not really. He had the shades open and the lights from the street were shining on the sofa.

Bowers: Who else was in the apartment when you went in?

Van Arsdall: Just Fleetwood and that lady that I know of.

Bowers: Wasn't there more than that?

McGinty: There wasn't another fellow in there? Another guy in there?

[14] Van Arsdall: That might have been the guy in the hall that I hollered for the police?

McGinty: Let's stay within Fleetwood's apartment for now. You were in there. Were you trying to get Fleetwood up or was she trying to get him up?

Van Arsdall: We were both trying to get him up.

McGinty: Both trying to get him up. Did you get him up?

Van Arsdall: No.

McGinty: What did you do then?

Van Arsdall: We just waited for the police to come down.

McGinty. Where did you wait?

Van Arsdall: Right there by the door of Bobby Fleetwood's apartment.

Bowers: Did you use the bathroom in Fleetwood's apartment?

Van Arsdall: No.

McGinty: Did you have a knife?

Van Arsdall: No.

Bowers: You haven't had a knife in your hands this evening?

Van Arsdall: No.

McGinty: You didn't wash up in Fleetwood's apartment?

Van Arsdall: I washed my hands after I got done checking that lady out.

Bowers: Where did you wash your hands?

Van Arsdall: In the sink.

Bowers: Where was that?

Van Arsdall: In the kitchen.

Bowers: You didn't use the bathroom?

[15] Van Arsdall: No.

Bowers: Why didn't you use the bathroom?

Van Arsdall: That was the closest one.

Bowers: Did you wipe your hands on you after you had the blood on your hands? Did you wipe the blood on your clothing?

Van Arsdall: I might have, I don't know.

McGinty: What would you say if I told you that witnesses stated that you came into the apartment with a knife in your hands?

Van Arsdall: I don't know what to say, I don't remember anything.

McGinty: You don't remember?

Van Arsdall: No.

McGinty: Is it possible that you had the knife?

Van Arsdall: I'm just saying I do not remember having the knife or saying anything to anybody about a fight.

McGinty: That other subject who was in Fleetwood's apartment, he didn't take you to the window to see if your hands were cut?

Van Arsdall: Not that I remember.

McGinty: Is it possible?

Van Arsdall: I am saying, not that I can remember.

Bowers: Now you aren't too sure about everything. Before you said you were sure and now you don't remember. What is the reasoning for that?

Van Arsdall: I just want to go home, get something to eat, get in a nice warm bed and get some rest.

Bowers: Are you saying that's your reasoning for not remembering?

Van Arsdall: No, because I don't remember.

Bowers: But you were remembering everything else so well.

Van Arsdall: I remember parts of it, parts.

[16] Bowers: You are saying there are parts that you have forgotten that happened this morning?

Van Arsdall: It might have happened or it might not. I don't know.

Bowers: But you are saying you don't remember everything that happened, correct?

Van Arsdall: I don't remember everything that happened.

Bowers: So therefore, something, you could have killed this woman and not remembered it, correct?

Van Arsdall: I am not saying that. I wouldn't kill nobody.

McGinty: Did you kill this woman?

Van Arsdall: No sir, I did not.

Bowers: How do you know? You just said you don't remember everything that happened to you.

Van Arsdall: Man, I don't believe this.

McGinty: In your statement, you stated that, to the best of your knowledge, the only ones in the apartment were you, Danny and this subject that was in bed that you couldn't identify?

Van Arsdall: Yes, he, she whatever.

Bowers: Who was it that got killed?

Van Arsdall: I believe it was the lady I saw earlier in there, I'm not sure.

Bowers: Was it the same lady who was in bed asleep?

Van Arsdall: I don't know. I couldn't see who it was.

Bowers: Doesn't Danny have lights in his apartment?

Van Arsdall: Yeah, but he had them off.

[17] Bowers: You mean it was that dark in there, or that light that you could see the cushions and where everything were?

Van Arsdall: I could see where the cushions were, but I couldn't make out the face of the person.

Bowers: Was the person dressed or unclothed or what?

Van Arsdall: She was under the covers.

Bowers: She was under the covers?

Van Arsdall: He or she.

Bowers: How do you know she was under the covers?

Van Arsdall: Because she had blankets over her.

Bowers: You said you couldn't see that well.

Van Arsdall: I couldn't see her face.

Bowers: Did you try to see who it was? You didn't ask Danny who it was?

Van Arsdall: I didn't bother to ask him.

Bowers: Why not?

Van Arsdall: Because I lived with Danny before.

Bowers: When a man has a person in bed with him, you are not going to question him about who it is in bed with him?

Van Arsdall: No I didn't.

Bowers: You just don't intrude anywhere?

Van Arsdall: I don't intrude.

Bowers: You said you were in the bed, or the floor or on the cushions?

Van Arsdall: He said it was all right for me to sleep there.

Bowers: You didn't care who was in bed?

Van Arsdall: Right, All I wanted to do was get some rest.

McGinty: When you got up, after you woke up and you were going out in the hall to get some air, did you see anything then?

[18] Van Arsdall: No.

McGinty: Did you look?

Van Arsdall: Not really. I was just walking up and down the hall.

Bowers: How long were you in the hall, five minutes, ten, fifteen?

Van Arsdall: I really don't know.

Bowers: You didn't hear any noises while you were in the hall?

Van Arsdall: Nothing I could really say I could hear. I thought I heard something once but I couldn't be sure.

McGinty: What do you think you heard?

Van Arsdall: Just a noise.

Bowers: Like what?

Van Arsdall: Just a noise, that is all.

McGinty: What type of noise?

Van Arsdall: Faint and noisy.

Bowers: Did it sound like someone needed help?

Van Arsdall: It was faint. I could hardly make it out.

Bowers: So you didn't care where it came from?

Van Arsdall: I couldn't tell which direction it came from. I didn't know if it came from the bottom of the stairs, back the hall or what.

Bowers: You said you were in the hall by yourself, the doors to the apartments were closed?

Van Arsdall: Yes and the lady came out and seen me walking and said she heard a noise.

Bowers: I'm talking about when you heard the noise, you couldn't tell where it came from?

[19] Van Arsdall: No.

Bowers: In the hall, it would have been distinct, wouldn't it have? By the doors being closed to the apartments?

Van Arsdall: I was near the stairway at the time. I thought I heard the noise but I am not sure what.

Bowers: What did the lady say to you when she came out of the apartment? You just stated that she said she heard something. What did she say?

Van Arsdall: I don't remember what she said. But she knew Danny. I believe I seen her earlier that night, so she knew me.

Bowers: She knew you? Where would she know you from?

Van Arsdall: I was over to Fleetwood's earlier. Supposedly that is Fleetwood's old lady, I don't know.

Bowers: How did you find that out?

Van Arsdall: Well, he told me. He said that's my old lady.

Bowers: You told me when you saw Fleetwood, he was asleep on the sofa.

Van Arsdall: No earlier.

Bowers: You mean you were there earlier around 4:30?

Van Arsdall: Yeah.

Bowers: She was there then?

Van Arsdall: Yeah, she was there then, I seen her—unintelligible—.

Bowers: Was she the only lady you saw there?

Van Arsdall: I went over there to Fleetwood's apartment. I believe she was at Danny's earlier, but I couldn't swear to it. I'm confused.

Bowers: How many women did you see there?

[20] Van Arsdall: A blonde haired lady and an old woman.

Bowers: Isn't it true that you tried to rape that old women?

Van Arsdall: No, I did not such thing.

Bowers: Then what caused her to get upset with you?

Van Arsdall: She didn't get upset with me that night.

Bowers: You and her got into a fight and apparently you killed her.

Van Arsdall: I did not get in a fight or argue.

Bowers: You just killed her.

Van Arsdall: And I did not kill her.

Bowers: How do you know you didn't get in a fight? You just stated you didn't remember everything that happened?

Van Arsdall: You guys are trying to confuse me.

Bowers: We aren't trying to confuse you.

Van Arsdall: The Hell you ain't.

Bowers: We're asking you questions.

Van Arsdall: Bullshit.

Bowers: We're asking you questions.

Van Arsdall: You're trying to confuse me.

Bowers: We're not trying to confuse you.

Van Arsdall: The Hell you ain't.

Bowers: If you are telling the truth, you can't be confused and I don't believe you're telling

Van Arsdall: I know myself. I would not strike the lady at all.

Bowers: You would not strike a lady?

Van Arsdall: No I wouldn't. Even if I was drunk, I would not strike a lady.

[21] Bowers: How do you know what you would do if you were drunk?

Van Arsdall: Because I know myself.

Bowers: You said a few minutes ago you don't remember everything that happened. So therefore that could be telling that you could strike a lady because you don't remember everything that happens.

Van Arsdall: I know myself. I know I would not strike a lady.

Bowers: You're saying you don't think you would strike a lady. If you can't remember everything that happened then you don't know what you're going to do.

Van Arsdall: You're trying to confuse me again.

Bowers: I'm not trying to confuse you.

Van Arsdall: Bullshit.

Bowers: I'm just stating what you said.

Van Arsdall: I just want to go home man. Shit.

Bowers: You're not going home Robert because you're being charged with Murder.

Van Arsdall: For what?

Bowers: You're being charged with Murder.

Van Arsdall: You got anything on me?

Bowers: I sure have.

Van Arsdall: What?

Bowers: As of right now, 0729 hours, this statement is being completed. Still present are Chief McGinty, Robert Van Arsdall and Det. Bowers. The date is 01-01-82.

STATE'S EXHIBIT 74, STATE OF DELAWARE v. ROBERT E. VAN ARSDALL, Crim. Action Nos. IK82-01-0073, 0074, SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

[1][3] It is now 0743 hours. Present are Det. Bowers and Robert Van Arsdall. We are in an interviewing room at Delaware Correctional Center. This is in reference to a homicide that occurred 01-01-82. [*Miranda* warnings and waiver deleted.]

Bowers: Do you still wish to give a statement?

Van Arsdall: Yes, sir. The statement I said before wasn't true. I was trying to cover up for my buddy.

Bowers: Cover up for Pregent?

Van Arsdall: Yeah.

Bowers: Okay Robert, go ahead.

Van Arsdall: I was covering up for my buddy when I said that.

Bowers: What do you mean covering up for your buddy?

Van Arsdall: He was the one killed her, I seen him do it.

Bowers: Can you tell me how it happened?

Van Arsdall: It happened a little while, not too long after I got there.

Bowers: About what time was that?

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[3]The transcript is admitted into evidence at Vol. X, pg. 12 of the trial transcript. The actual tape, State's Exhibit 29, was introduced into evidence at Vol. VIII, pg. 9 of the trial transcript.

Van Arsdall: I got there about 11:30. I guess it was about no more than two hours after that.

Bowers: You mentioned your buddy, who was your buddy?

Van Arsdall: Daniel Pregent.

[2] Bowers: Okay, do you want to tell me just what happened?

Van Arsdall: He told me to lay down on the cushions and go to sleep. He got on the fold out couch with Doris what-her-name.

Bowers: Doris Epps.

Van Arsdall: Doris Epps. I was falling off to sleep and the next thing I know he was dragging her past my feet into the kitchen. I got up to see what was going on. He struck me back here and dazed me for a while.

Bowers: Struck you with what?

Van Arsdall: His hand.

Bowers: Struck you back where?

Van Arsdall: Right about in here.

Bowers: Behind your right ear?

Van Arsdall: Somewhere in there.

Bowers: On your neck?

Van Arsdall: Yeah.

Bowers: Then what happened?

Van Arsdall: I finally got back to know what I was doing, he was just

Bowers: He was just what?

Van Arsdall: He had stabbed her twice that I know of and then he started cutting on her.

Bowers: What were you doing all this time?

Van Arsdall: I was on the floor. Then I got up and I tried to pull him off her and he pushed me and I fell down and I fell almost on top of her. That is probably where the hell that damned blood came from. When I fell, my hands just went right where her head was.

Bowers: Then what?

Van Arsdall: I was trying to get back up and he hit me again in the back of the neck. I laid there for a couple of minutes. He came back in from where the sink was. He left the knife in her.

Bowers: Where was the knife at that was in her? What part of her body?

Van Arsdall: He left it down here by the pelvis.

Bowers: The pelvis, meaning the area of the vagina?

[3] Van Arsdall: The pelvis part, down there. Man it was a gory sight.

Bowers: Then what happened?

Van Arsdall: He put his shirt back on and went in and laid down.

Bowers: He didn't have his shirt on?

Van Arsdall: No, he didn't have no shirt on at all.

Bowers: Where did the blood come from in the bathroom?

Van Arsdall: Bathroom? I think he went to the bathroom. I am not sure if he did or not.

Bowers: You think he did?

Van Arsdall: Yeah, like I say, I was stunned for a few minutes. I don't know where he went to.

Bowers: Did he have blood all over him or what?

Van Arsdall: He had it on his chest and his arms but evidently he washed it off because he didn't have no blood on him when he put his shirt back on.

Bowers: Then how did you end up with the knife?

Van Arsdall: Some kind of crazy shit going through my head. I picked up the knife and went across the hall. They asked me what was happening and I just said I had got in a fight.

Bowers: You mean you didn't help him do any cutting at all?

Van Arsdall: No I didn't. I just took the knife out of her and went across the hall.

Bowers: What made you take the knife out of her?

Van Arsdall: I really don't know, I should have just left it there.

Bowers: So when you got back to the bed?

Van Arsdall: I just stayed there until the police got there.

Bowers: How long had it happened before the police got there?

Van Arsdall: I would say about five to ten minutes.

[4] Bowers: Why did he cut her? Why did he kill her?

Van Arsdall: I've got no idea.

Bowers: Did they have sex that night?

Van Arsdall: I heard them move around in the bed. I figured that's what they were doing.

Bowers: Did she have her clothes off at all that you know of?

Van Arsdall: She had no clothes on at all except for

Bowers: I mean when she was in the bed.

Van Arsdall: I couldn't tell. She had the covers on top of her when I laid down.

Bowers: But you did hear some noises from the bed? What kind of noises?

Van Arsdall: Like moaning and the bed squeaking. I heard heavy breathing too. I figured he was just getting a piece.

Bowers: That didn't bother you? You didn't want a piece either?

Van Arsdall: No, I was too damned tired.

Bowers: You just laid there?

Van Arsdall: Yeah.

Bowers: You didn't get excited by all the activity?

Van Arsdall: No.

Bowers: After all the moaning and groaning and so forth and heavy breathing, what did you do?

Van Arsdall: I fell off to sleep because I was tired.

Bowers: Do you know whether or not Danny has ever been in Maryland before? Has he ever committed any act that you know of?

Van Arsdall: Not that I know of sir. I really haven't known him that long.

Bowers: He said that you knew him for quite some time.

Van Arsdall: See it's been, I'd call that quite long, maybe 4 years, ever since I moved into Kentwoods.

Bowers: Has he ever lived in Maryland at all?

Van Arsdall: Not that I know of sir.

Bowers: He ever frequent the beaches down in Maryland or anything? That area that you know of?

[5] Van Arsdall: I never knew him to go to the beaches. If he did, he never told me.

Bowers: Is there anything else you want to say?

Van Arsdall: No sir.

Bowers: It is now 0752 hours. The date is 01-03-82.

STATE'S EXHIBIT 75, STATE OF DELAWARE v. ROBERT E. VAN ARSDALL, Crim. Action Nos. IK82-01-0073, 0074, SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

[1][4] The time is 0904 hours. I am Detective Carlton Bowers of the Smyrna Police Department. Present is Chief Donald McGinty of the Smyrna Police Department and Daniel Pregent. This is in reference to a homicide that occurred on 01-01-82. [*Miranda* warnings and waiver deleted.]

Bowers: Why don't you start off telling us what happened from the time your party started.

Pregent: Everything was running pretty smooth. I do understand this was Doris.

Bowers: Correct. What time did your party start?

Pregent: It started early, about 4:00. It was pretty early.

Bowers: 4:00 p.m., December 31, 1981?

Pregent: 4:00 in the afternoon yesterday. What was yesterday? Today is the 1st? It started early and everything, as far as I know, with a few minor exceptions, was running pretty smooth. The subject was passed out on the couch.

Bowers: When you say "subject" you are talking about Doris?

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[4]The transcript is admitted into evidence at Vol. X, pg. 12-13 of the trial transcript. The actual tape, State's Exhibit 30, was introduced into evidence at Vol. VIII, pg. 11 of the trial transcript.

Pregent: Yes, she passed out on the couch and I picked her up, folded the couch out and set her back on it.

[2] Bowers: Did she wake up during this time?

Pregent: No, she was pretty well out of it.

Bowers: From what?

Pregent: From drinking

Bowers: Had she been doing anything else?

Pregent: No, she doesn't.

Bowers: Doesn't what?

Pregent: She was far out, but she didn't smoke at all. I don't think she even does, she might. And then, I laid down beside her and I got some sleep, or was trying to get some sleep and that is all I can remember clearly. I was drinking too. The next thing I know, somebody was waking me up and I am out in the hallway and I am handcuffed, just outside the door. I just happened to be involved by Vanarsdale, the guy who was arrested with me. And I happened to look in and got a partial view of what happened for the first time and that is how I know what we are dealing with. It was the first time I saw it. I went to sleep and I didn't wake up to do anything like that.

McGinty: You say a partial view, partial view of what?

Pregent: Partial view of the body with blood all over it sitting in my kitchen. It would have been right about in front of my counter. I didn't see that until I was cuffed, then I saw it.

Bowers: Daniel, tell me something. Was Doris wearing any clothing when she went to sleep?

Pregent: Yes, she had all her clothes on and no attempts at all by me to take them off.

Bowers: Did this include her shoes?

Pregent: No, she didn't have her shoes on. Her shoes were off, sorry.

[3] Bowers: Was she covered up when she was laying down?

Preegnt: Yes, I remember the yellow blanket was the electric blanket or a blue blanket, but she was covered.

Bowers: Were you covered up when you were laying down beside her?

Pregent: Yes, I was.

Bowers: What did you have on?

Pregent: I had all my clothes on and the blanket.

Bowers: Did you have on what you have on now?

Pregent: Yes

Bowers: What time did Vanarsdale get to the apartment?

Pregent: He got there probably 7 or 8.

Bowers: Did he leave at all once he got there that you know of?

Pregent: He might have.

Bowers: You say he might have, would you elaborate on that?

Pregent: He was there for the duration so I can't say whether he did leave or he didn't.

McGinty: He was there for the duration—of what?

Pregent: The Party, until the time everyone went to sleep. He was sleeping there too.

McGinty: You said everybody—give me names.

Pregent: There was Bobby Fleetwood. Janie (I am not sure of her last name) and Ida Mae. Those were the ladies. Bobby Vanarsdale, myself, Mr. Fleetwood and Robert Crain. Those were all the names. There was two people who came to the party that I don't know the names of but they are friends of Crains.

Bowers: Were they black or white?

Pregent: They were black

Bowers: Male or female?

Pregent: Male. This was early and they stayed for a while and then they [4] left. I am not clear on their names.

McGinty: At the time you went to sleep, who was in the apartment?

Pregent: Myself, Doris and Robert Vanarsdale.

Bowers: How well do you know Robert:

Pregent: I have known him for a couple of years. I used to have a trailer down in Dover. I used to live in Kentwoods and that is where I knew him. He helped me share expenses on this trailer and he was staying with me then when we lived on Little Creek Road at Rays Rental. I figured I knew him pretty well.

Bowers: When you went to sleep, did you wake up at all?

Pregent: I think I did get up once and go next door to where Fleetwood was at and the thing is, when I came back everything was still fine.

Bowers: Why did you go to Fleetwood's apartment?

Pregent: Well, I just wasn't able to sleep just then and they had gone and come back so I heard them when they came back and I got up and went over there.

McGinty: When you got up and went to the Fleetwood apartment, who was left in your apartment?

Pregent: I left Doris—it was only for a short time—and Bobby was there and when I came back, everything was still okay.

McGinty: Bobby who?

Pregent: Bobby Vanarsdale.

McGinty: Bobby Vanarsdale and Doris was there?

Pregent: I think so.

Bowers: What do you mean you think so?

Pregent: I was practically in shock. These memories aren't coming back exactly as clear as I would like them to be myself.

McGinty: You left your apartment and went over to Fleetwood's and you returned to your apartment. Who was there?

[5] Pregent: Robert and Doris was still there and she was just laying on the couch and hadn't been disturbed.

Bowers: Where was Vanarsdale when you came back?

Pregent: He was still up and walking around.

Bowers: Was he up and walking around when you left?

Pregent: Yes, and he was still up and walking around when I got back. As a matter of fact, I can't even tell you That is how unclear it was.

Bowers: Had he been drinking?

Pregent: Yes, he had been drinking but he was behaving himself.

Bowers: When you left was he drinking?

Pregent: Yes—well he had been drinking a little bit all night.

Bowers: I am talking about when you got up and went to Fleetwood's—was he drinking at that time?

Pregent: Yes

Bowers: Was he drinking when you returned?

Pregent: Yes he was.

Bowers: Where was he in the apartment when you returned?

Pregent: I think it was in the living room or in the bedroom, whichever.

Bowers: Where was he when you left?

Pregent: I would think it was in the bedroom but I can't say which room he was in. I remember getting up

and going to see these people next door. Janie came in and Bob came in.

McGinty: Came in where?

Pregent: Came up the stairs you know and I heard them in the hallway and I went out and met them and that was about the extent of my leaving the apartment.

McGinty: When you went out in the hall, you said Janie and Bob. Bob who?

[6] Pregent: Bob Fleetwood

McGinty: Where did you go then?

Pregent: I stopped in the apartment to say hello for a little bit but I didn't stay long. I came right back.

Bowers: What do you call long? Approximately how long?

Pregent: Maybe 5 minutes. That was late, that was just before I went to sleep.

Bowers: When you got back to the apartment, prior to your going to sleep, where was Vanarsdale?

Pregent: He was in the apartment.

Bowers: Whereabouts in the apartment?

Pregent: I can't be more specific than he was in there because he was still awake, he wasn't sleeping.

Bowers: Was there any lights on in the bedroom?

Pregent: Actually, when I laid down, I turned the lights off but the lights were on in the kitchen.

McGinty: You remember turning the lights off but you don't remember which room Vanarsdale was in?

Pregent: In the same room as myself from everything I can remember. He just stretched out on some cushions. I thought that's what it was.

McGinty: Did you have any conversation with him when you were in the room?

Pregent: We had some, we go back a couple of years you know. Long time no see, how you doing, I didn't expect to see you up here in Smyrna.

McGinty: Did you have any conversation reference to the partner you had in bed—Doris?

Pregent: I don't believe we talked about that.

McGinty: You don't believe, don't you know?

[7] Pregent: I can't say for sure.

McGinty: In other words, you could have?

Pregent: I could have but it doesn't seem all that likely. I might have explained who she was but as far as . . .

McGinty: Did he ask you who she was?

Pregent: I don't believe he did.

Bowers: You just volunteered that information?

Pregent: I might have but I am not sure I said anything.

McGinty: Did he know who she was?

Pregent: No, he didnt. The lady—I just met her the same day. She came up to look at the apartment. Bobby Fleetwood is going to be leaving and she had been talking to the landlord and everything and I said you

know, if you can come up with the full amount of the deposit and the first full month's rent in advance, the only problem will be with hot water and cooking gas. I said look, I will help you out. You can come over here to cook or get hot water when you need it, any time you need it. I said I am just neighborly. That is the best I can do, you know.

McGinty: Prior to that, you had never met Doris?

Pregent: Prior to that I have never met Doris.

McGinty: And all of a sudden, you just ended up in bed with her?

Pregent: No, she passed out on the couch. I was drunk and I was lonely and I just felt like maybe sleeping next to somebody warm and I wasn't trying to do nothing.

McGinty: What do you mean you wasn't trying to do nothing?

Pregent: I wasn't trying to do nothing except laying down to go to sleep.

Bowers: You mean you had a woman next to you who was intoxicated and not responsible and you didn't try to take advantage of her?

Pregent: No

Bowers: You didn't touch any organ on her body or anything?

[8] Pregent: I think I put my arm around her.

Bowers: When did Vanarsdale meet Doris?

Pregent: Last Night

Bowers: He actually met her to say something to her?

Pregent: She passed out early, she zonked out. She had been drinking quite a bit.

Bowers: He didn't meet her to talk to her?

Pregent: He did meet her to talk to her. She was cooking spaghetti when Bob came in.

Bowers: She was in the kitchen cooking?

Pregent: Yes, she was in the kitchen cooking.

Bowers: Were there any words between the two while he was there?

Pregent: Not that I know about.

McGinty: You were in the room with them at all times?

Pregent: Not all times, no, I couldn't say that they didn't.

Bowers: On the relationship between you and Doris on the bed, what position were you in the bed, whereabouts on the bed were you?

Pregent: Towards the right side closest to the door stretched out lengthwise.

Bowers: You was closer to the door?

Pregent: I was closer to the door.

Bowers: She was farther from the door, between you and the windows?

Pregent: Yes.

Bowers: Where were the cushions?

Pregent: I took them off. They probably were on the left hand side but they might have been on the right hand side. As I recall, I said something to Robert Vansardale about stretching out on the cushions but I am not sure if I got them stretched out for him or not.

[9] Bowers: Did you feel any movement when you were asleep in the bed as if somebody was moving across you or getting out of the bed?

Pregent: No

Bowers: Did you hear any noises while you were asleep that awakened you?

Pregent: Maybe I did drink too much but I was asleep and after that . . .

McGinty: You said earlier in your statement you laid down and you couldn't sleep and you got up and went over to Fleetwood's apartment and you returned to your apartment.

Pregent: I wasn't gone 5 minutes.

McGinty: Okay, did you go back to bed?

Pregent: Yes.

McGinty: Approximately what time was that?

Pregent: I really don't know. It could have been a wide range of hours. I didn't look at the clock.

Bowers: Isn't it true that you and Vanarsdale sexually assaulted Doris and she resisted and in return she was cut?

Pregent: No.

McGinty: How do you explain the blood stains on your pants?

Pregent: It is the first time I have seen them. I can't explain it.

McGinty: You said that you observed the body in the kitchen when you were picked up.

Pregent: When I was picked up. There's got to be blood stains. That is the first that I remember seeing this.

McGinty: You are telling me that this woman was laying on the other side of you in the bed.

Pregent: I was asleep. When I got woken up that is when I saw it. I had passed out.

McGinty: Saw what?

[10] Pregent: I saw an arm and a leg, a partial view. I didn't even see the rest of it. I saw an arm and a leg and a pool of red.

Bowers: You tell me that you didn't notice any blood in the bedroom?

Pregent: No, I didn't, not when I woke up. I didn't notice anything. I remember all of a sudden there was cops and I was being handcuffed in the hallway and I couldn't understand why. And I turned around and managed to look in the kitchen and I could see why and I didn't even see the whole body, just an arm and a leg and it didn't even look like a black woman, it looked like a white woman.

Bowers: You have a problem with remembering—is it possible that you would have committed the act of murder and not remember it as a result of your liquor and drugs?

Pregent: The only drug that I would have done, I smoked a little bit of pot and if I had done this, in the first place, I would have found blood on more than just my pants. These are the same clothes I have been wearing all night.

McGinty: What would you say if I told you that the sink in the bathroom was running? Was it possible that you went in there and washed up?

Pregent: The cold water in there doesn't quite shut off anyway. Do you mean "running" or just . . .

Bowers: Running.

Pregent: Well, if I did, it still wouldn't have been washed out of my shirt.

McGinty: Is that the only shirt you own?

Pregent: No, but it is the one I was wearing all night.

Bowers: Pull up your sleeves, both of them. What type of kitchen knives do you have in your house?

Pregent: Two long ones. One has a brown handle and one has a black handle. One has a serrated edge and the other a straight one.

[11] Bowers: Which one has a serrated edge?

Pregent: The one with the brown handle. It is a butcher knife maybe a foot long. Both are about the same length?

Bowers: Where is this knife usually kept?

Pregent: Usually in the room that has the kitchen sink.

Bowers: The one where the body was found or the back room?

Pregent: In the back room

Bowers: Where is the other one kept?

Pregent: Either in the drawer or in the same place in the back room by the sink.

Bowers: What drawer, in which room?

Pregent: The drawer all the way to the left hand side.

Bowers: In which room?

Pregent: Kitchen itself.

Bowers: Next to the counter on the wall, next to the refrigerator?

Pregent: That is the one, left hand side facing it.

Bowers: Was that knife out for any reason this evening?

Pregent: Yes, there was some cooking going on tonight, spaghetti and everything else and the knife was out.

McGinty: What knife?

Pregent: I believe it was the one with the serrated edge but I could not be positive.

Bowers: Why did you say that knife?

Pregent: I believe they were both out because of the spaghetti. [Omission in original.] back to his apartment and that was earlier in the day, 4:00 and I had spaghetti on cooking waiting for Doris to come back because I had said, Hey, you come on over. You know, I had all this stuff cooking, spaghetti and all, and we will have a New

Year party and everything so I went [12] to get the makings and I saw Vanarsdale on the street and I told him to come on up and then I went back to the place and the spaghetti was all stuck together and I took one of them to break the spaghetti up. So they were used for cooking and I couldn't tell you which one was out and which one wasn't.

McGinty: You said a few minutes ago it was the one with the serrated edge.

Pregent: I think it was the one with the serrated edge but I couldn't be positive.

Bowers: Did you use that knife on Doris?

Pregent: No.

Bowers: You and Doris didn't have any confrontations of any kind?

Pregent: No

Bowers: You didn't try to assault her and she resisted?

Pregent: No

McGinty: How about Vanarsdale?

Pregent: I don't know.

McGinty: You mean to tell me that you were laying in bed and apparently the victims body was drug over you and you have no knowledge of it?

Pregent: That is correct.

McGinty: Can you explain the blood on lyour pants? You stated that you were covered up with a blanket.

Pregent: To the best of my knowledge I was.

McGinty: To the best of your knowledge, but you don't know, do you?

Pregent: I remember up to the point of going to sleep, but I had been drinking quite a bit all night. When I went to sleep for the duration, I was out of it.

McGinty: Isn't it possible that you weren't asleep all that time? Isn't it possible that you assisted, if not committed, this crime?

EXCERPTS OF TRIAL TRANSCRIPT,
STATE OF DELAWARE v.
ROBERT E. VAN ARSDALL, Crim. Action Nos. IK82-01-0073, 0074, SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

Opening Argument of John R. Williams, Attorney for Robert E. Van Arsdall
Volume II at 28-33, 38-42

* * *

[28] I submit to you that the evidence in this case will show that Daniel Pregent's second floor apartment as it appeared during the early morning hours of January 1, 1982, was a shocking and frightening scene as human beings, the individuals who were present or who observed this bloody scene and the naked, mutilated body of Doris Epps may also have been frightened and shocked. I submit to you that such a horrible scene would repulse any normal individual and that factor should also be considered by you in evaluating the thoughtfulness and reliability of the testimony of individuals who were witnesses at such a scene.

Perhaps most importantly it is essential for you to examine any potential bias, interest or ulterior motive of a witness in rendering his or her testimony. That is, you ought to consider whether or not there is any reason for a witness to testify in one fashion or another in this case.

As jurors you must maintain an open mind throughout the trial. Do not make up your minds until both sides have had an opportunity to present their witnesses and all of the evidence is before you. Normally [29] there are two sides to every story. If you make up your mind after only the prosecution has presented its case, you will be making a one-sided determination. You are required to reserve your decision as to the innocence or guilt of Bobby VanArsdall until all of the evidence and testimony has been presented.

Not only must you keep an open mind throughout this trial and carefully evaluate the testimony of each witness, but you should listen for what the witnesses do not say. What I mean by this is that the witnesses which the State will present will testify to certain facts which honestly are not in dispute.

There is little doubt, for example, that Doris Epps died sometime on December 31, 1981, or January 1, 1982, and that her body was found in the kitchen of Daniel Pregent's apartment in Smyrna, Delaware. The fact that the body of Doris Epps also suffered certain injuries or wounds is not a matter which is denied. What is in dispute is how the death of Doris Epps occurred or, more particularly, who caused the death of Doris Epps.

When I say you should listen for what the witnesses do not say, I am attempting to alert you to the fact that

each of the witnesses who will testify on behalf [30] of the State has only a limited perspective in this matter. All of the police officers that will appear as witnesses in this case did not arrive on the scene until after Doris Epps was dead. Furthermore, I submit to you that none of the other witnesses which the State will produce is able to testify that he or she actually viewed the killing of Doris Epps.

The reason for this is there are only three individuals who know what occurred in Daniel Pregent's apartment at the crucial time: Doris Epps who is now deceased, Daniel Pregent who as Mr. Reed informed you will be tried at a later date for this same offense, and Robert VanArsdall the individual on trial here today. All of the individuals who will testify on behalf of the State will, therefore, be relating only what is known as circumstantial evidence. It is true that some of the circumstantial evidence may be highly suspicious in nature, but it is still only circumstantial evidence. It is essential that you attempt to keep in mind which evidence in this case is only circumstantial in nature and which evidence directly concerns the crucial facts at issue.

The prosecutor assigned to this case has a job to do. His job is to convict Bobby VanArsdall of the [31] crime of first degree murder. The prosecutor is only doing his job when he produces witnesses and offers evidence on behalf of the State.

The individual who is the focus of this proceeding is the young man who is seated at defense counsel table. It is certainly no mystery who is on trial. Anyone who has attended a court proceeding or seen a trial on television knows that the defendant sits beside his lawyers. Now, some of the witnesses who testify in this case on behalf

of the State also know this fact. When those witnesses come to court, they may even be asked if they can identify Mr. VanArsdall and they may look around and they may even point to Bobby. To simplify matters, I will tell you right now that this (indicating) is Bobby VanArsdall the young man who is on trial before you.

Not only do you know who is on trial in this case, but you should know another thing that is of great importance. You should know that as Bobby VanArsdall sits before you today without any evidence having been produced that he is innocent. In fact, there is a presumption that he is innocent. Unless and until the State has proved to your satisfaction by proof beyond a reasonable doubt each and every element of the offenses charged, Bobby VanArsdall [32] cannot be found guilty of any criminal conduct. He is presumed innocent and he must be proven guilty.

The purpose of an opening statement such as this is for the lawyers to let you know what they intend to prove. Of course, Bobby VanArsdall does not have to prove a thing. He is presumed innocent and the prosecution must carry the burden of proving him guilty beyond a reasonable doubt; however, we do intend to show you as this trial progresses that what the prosecutor has said is not necessarily the way things happened.

Although we do not have to prove a thing, we will nevertheless prove to you that there are substantial reasonable doubts. We will prove that the State has not met its burden of proof. We will prove that insufficient evidence has been produced to meet this heavy burden of proof and finally we will prove that Bobby VanArsdall is innocent of the two accusations brought against him.

There is no obligation on Bobby VanArsdall's part to prove anything. The entire burden of proving guilt beyond a reasonable doubt as to each element of each offense rests upon the prosecution. Nevertheless, ladies and gentlemen, we intend to prove to you that the prosecutor has failed to meet this burden. We intend to prove [33] to your satisfaction through the mouth of the accused himself that he is innocent of this crime. He will take the witness stand and explain to you why he is innocent. Bobby VanArsdall will also tell you who did commit this crime.

We intend to prove through the direct testimony of a witness who actually observed what occurred that Daniel Pregent was the one who murdered Doris Epps. Daniel Pregent is not on trial here today. Daniel Pregent will be tried however on these exact same charges at a later date. Please remember that Daniel Pregent is also charged with the first degree murder of Doris Epps.

The burden of proof, as I have said, is entirely upon the State. The degree of proof necessary to establish guilt is what is known as proof beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond all doubt, but it is more than simply proof by a preponderance of the evidence.

* * *

[38] * * *

Ladies and gentlemen, I submit to you that no thorough police investigation in a case such as this could be concluded within nineteen minutes such that two individuals could with any real certainty be arrested for an offense as serious as first degree murder. Just to give you an idea of how short a time nineteen minutes is, I checked the time when I began this opening statement. That was at 11:30. The time now is after 12:00 o'clock. We intend to prove that such a hasty investigation by the police in this case resulted in the arrest of an innocent young man who had the misfortune to be in the wrong place at the wrong time. Throughout the testimony you should keep in mind that the police think they solved this homicide supposedly involving multiple defendants in only nineteen minutes.

Before we go any further in this case, there is a matter which in all honesty I must disclose to you. I submit to you that there will be presented as evidence two tape recorded statements. The prosecutor has already referred to those statements which were taken from [39] Robert VanArsdall by the Smyrna police. The first statement occurred at the Smyrna Police Department within hours after the arrest. Bobby VanArsdall in his own testimony from the witness stand will tell you that there are matters contained in that January 1 statement which are simply not true, and he will explain to you why he made such incorrect statements to the police when initially questioned. The January 1 statement I submit indicates a certain confusion by Bobby VanArsdall. You can examine the statement and judge for yourself.

In the statement of January 1, Bobby denies having possession of Danny Pregent's kitchen knife. That is incorrect. We intend to prove that even such possession

however does not mean there was any criminal conduct by this young man.

Secondly, in this January 1 statement Bobby denies knowing how Doris Epps died. This inaccuracy and lack of candor was voluntarily corrected by Bobby when of his own free will and volition on January 3, 1982, he requested to speak with Detective Bowers again so that he could tell him what did occur. We intend to prove that this second statement of January 3 when Bobby told the police that he does know what happened and that he had [40] been trying to protect his friend, his buddy Danny Pregent, is correct.

Thirdly, I submit to you that Bobby's own testimony in this trial will reveal another misstatement in the January 1 recording which denial was made out of fear and embarrassment. What I am referring to here is Bobby's denial in the January 1 statement of any sexual contact earlier in the evening with Doris Epps. That initial denial of sexual conduct was not true. Bobby VanArsdall I submit will quite candidly tell you that he did have voluntary sexual contact with Doris Epps well before Doris Epps suffered any physical injuries at the hands of Daniel Pregent.

What Bobby VanArsdall intends to prove in this case is that Danny Pregent, the other individual charged with the same offenses, killed Doris Epps with a kitchen knife. We intend to prove that this homicide occurred in Danny Pregent's apartment, that Bobby VanArsdall had returned to that apartment late in the evening of December 31, 1981, and entered through a back door of the apartment unseen by anyone except Danny Pregent who admitted him, that Bobby VanArsdall had only met Doris Epps

that evening and that for some reason unknown to Bobby VanArsdall [41] Daniel Pregent repeatedly stabbed and cut the woman.

We further intend to prove that the misfortune and injustice in this case is that Bobby VanArsdall was arrested for a crime he did not commit. Certainly there are suspicious circumstances here. We intend to prove that the blood on Bobby's clothing resulted when he attempted to restrain Danny Pregent and aid Doris Epps. We also intend to prove through Bobby VanArsdall's testimony that he took the bloody kitchen knife across the hall to Robert Fleetwood's apartment where three other people were present rather than leave it with Danny Pregent. I submit to you that simple possession of a knife and even bloody clothing does not make an individual a murderer.

When you examine Bobby VanArsdall's explanation of what occurred at Danny Pregent's apartment on New Year's Eve and the following morning of New Year's Day, there are a number of questions which I submit you must consider in any effort to gain a sincere understanding of this case. The first question is where Bobby VanArsdall and Daniel Pregent were found at the scene. Second, if this homicide ocurred in Danny Pregent's apartment and Bobby entered through a back door, why did Mr. VanArsdall not go away, out that same back door rather than go across [42] the hall to a neighbor's apartment while wearing bloody clothes and carrying Danny Pregent's kitchen knife, of all things? The third question which you should consider is why an individual who had just committed a murder would tell anyone else that the crime had taken place?

We intend to prove by Bobby VanArsdall's own testimony that while he was across the hall and in Robert Fleetwood's apartment he candidly told Mrs. Jane Meinier that something was wrong over at Danny Pregent's residence. The fourth and perhaps most important question which should occur to you is whether a knife murder is really the type of fatal assault that is committed by two persons or only one individual. I submit to you that the evidence in this case will show that there was only a single murder weapon: Danny Pregent's kitchen knife. Is it reasonable to conclude that two people took turns stabbing Doris Epps with the same knife? These are at least some of the questions which ought to occur to you as this trial progresses.

Please promise to reserve you final decision however until you have had an opportunity to hear all of the evidence. As each of you promised to reserve your decision in this case, we promise to conduct this defense as honestly, fairly and accurately as we can.

Cross-Examination of Robert S. Crain
Volume II at 108-114

* * *

[108] [Mr. Nicholas, defense counsel] Q. And you left with whom?

A. Excuse me?

Q. Who did you leave with?

A. My little brother, sir.

Q. Did Ida Mae Stevens leave with you?

A. She left around the time that I left, sir.

Q. And at the time you left Mr. VanArsdall was not in the apartment; is that correct?

A. I did not see him, sir.

Q. I would like to get back to the incident you referred to between Mr. Pregent and Ida Mae Stevens. Was that in fact a fight?

A. You mean as far as physical contact, sir?

Q. Yes.

A. I don't believe that Mr. Pregent made any physical contact with Ida Mae, no, sir.

Q. Is the reason why he didn't make any physical contact with her because you had to restrain him physically yourself?

A. Yes, I did. I can't say that is the reason, but I did restrain him.

Q. How did you restrain him?

[109] A. Just held him, grabbed him, sir, around his arms like this (indicating), put a lock on him, sir.

Q. While you were restraining him, didn't he kick a hole in the wall?

A. Yes, sir.

Q. Where was all this happening?

A. In the hallway, sir.

Q. Between the two apartments?

A. Yes, sir.

Q. Did he try to also punch holes in the wall?

A. I couldn't say that. I don't remember that.

Q. How long did this particular incident last between Daniel Pregent and Ida Mae Stevens?

A. Well, I don't know. I heard them fussing earlier, seemed like for about maybe—to me it seemed like fifteen or twenty minutes they were fussing before he got mad.

Q. The two of them?

A. Yes, sir.

Q. Where was all that fussing taking place?

A. I believe it was in his apartment, sir.

Q. In his apartment?

A. Yes, sir.

[110] Q. How did you get involved with it? You are hearing fussing going on for fifteen or twenty minutes. How did you become involved in it?

A. How did I become to be involved in it?

Q. Yes.

A. Well, when it got loud, you know, to the excess that is when me and Mr. Fleetwood walked out in the hall.

Q. Where had you been previous?

A. I was in Mr. Fleetwood's apartment at that time.

Q. So you and Bobby Fleetwood come out into the hall in response to your hearing shouting?

A. Yes, sir.

Q. Did you know who was shouting?

A. Yes, sir.

Q. And then did Pregent and/or Ida Mae Stevens also come out into the hall?

A. Pregent I believe he was in the hall when he was shouting, sir.

Q. Do you know if at anytime he wanted to take Ida Mae Stevens outside?

A. No, sir.

Q. After he got into the hallway, is that the [111] point at which you had to grab him?

A. Yes, when he was in the hallway, sir.

Q. Do you have any idea what this fight was about?

A. No, sir.

Q. You testified that everyone at the party to your knowledge was drinking alcohol; is that correct?

A. Yes.

Q. Does that include Doris Epps?

A. Yes.

Q. Was she drinking heavily?

A. I couldn't say she was drinking heavily because I wasn't paying any attention, sir.

Q. You testified that when you left Danny Pregent's apartment that Doris Epps was lying here (indicating) in the bed and Danny Pregent here (indicating); is that correct?

A. Yes.

Q. How did Doris Epps get into that bed?

A. When she passed out, me and Mr. Pregent laid her there in the bed.

Q. So the two of you laid her in the bed?

A. Yes.

[112] Q. Do you have any idea what time it was that she passed out?

A. No.

Q. How much time would you estimate went by between the time you put her to bed and the time you left?

A. I'd say about half-an-hour, sir.

Q. Before putting her to bed, did you have to unfold that bed?

A. Yes.

Q. Is it a sofa bed?

A. Yes.

Q. Did you unfold it?

A. Yes, me and Mr. Pregent did, sir.

Q. Were there cushions on it, on the sofa?

A. Yes.

Q. Where did you put those?

A. I don't remember, sir.

Q. So if she passed out approximately one half hour before you left, would that be 10:30 to 10:45 p.m. assuming that you left at 11:15?

A. To the best of my knowledge, yes, sir.

Q. How was she dressed when she was put to bed?

A. She was fully clothed, sir.

[113] Q. Was she covered up when you left?

A. I don't know if she had any covers or not, sheet or anything. I don't know.

Q. Were the lights on in the apartment when you left?

A. I believe the light was on in the living room, sir.

Q. In the living room?

A. Yes.

Q. Is this sofa bed in the living room of that apartment?

A. Yes.

Q. Was the radio on?

A. I believe it was, sir.

Q. Where is the radio located in the apartment?

A. In the living room.

Q. In the living room?

A. Yes.

Q. Was it loud?

A. You could hear it. I would say, yeah, it was playing, not too loud but you could hear it.

Q. Mr. Crain, when you left was Doris Epps alive?

A. Yes.

[114] Q. That was the last time you saw her alive?

A. Yes.

Q. Who was she with then?

A. Who was she with?

Q. Yes, the last time you saw her alive.

A. With Pregent.

Q. Could you describe Ida Mae Stevens? How big is she?

A. I'd say she's about five foot five.

Q. Five five. How much do you say she weighs?

A. One twenty-eight.

Q. One twenty-eight?

A. Yes.

MR. NICHOLAS: No further questions.

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Direct and Cross-Examination and Voir Dire
Of Robert J. Fleetwood
Volume III at 40-91

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DIRECT EXAMINATION

[40] BY MR. REED [prosecutor]:

Q. Good afternoon. Would you state your name one more time, please.

A. Yes. My name is Robert J. Fleetwood.

Q. Mr. Fleetwood, I understand you stutter.

A. Yes, sir.

Q. So as I ask you questions, please take your time in answering the questions. Try to keep your voice as loud as you can so everyone can hear what you have got to say. Where do you live, Mr. Fleetwood?

A. I live now?

Q. Yes.

A. At this present time I live at 130 North Main Street down in—I can't pronounce it.

Q. Smyrna, Delaware?

A. Yes, Smyrna, Delaware.

Q. What was your address on the 31st of December?

[41] A. It was 11 East Commerce Street.

Q. Again in Smyrna?

A. Yeah, Smyrna, Delaware.

Q. Approximately how long had you lived there?

A. I lived there—I lived there two months.

Q. And on the 31st, what was the status of your lease?

A. I was going to be out. I was supposed to be out by the first of the year.

Q. Now, on your floor was there another apartment?

A. Yes, there was.

Q. Basically where was that located?

A. Well, there was this one that was like from over at my partment. It was, you know—it was almost just like this, but it was off on an angle like.

Q. Basically across from your apartment?

A. Yes.

Q. Is there a hallway separating your apartment?

A. Yes.

Q. On the 31st, who was living in that apartment across from you?

A. This guy named Danny Pregent.

Q. Do you know how long he had lived there?

[42] A. No, not really.

Q. Do you know the defendant in this case Robert VanArsdall?

A. Yes, sir.

Q. Basically how do you know him?

A. I just do know him from that he has been around. He has been around.

Q. Around town?

A. Around town a few times.

Q. Do you see him in the courtroom today?

A. Yes, I do.

Q. Would you point him out, please.

A. Yes, sir, right there (indicating).

Q. You are referring to the defendant?

A. Yes, sir.

Q. Let's go back to the 31st of December. What were you doing on that day for most of the day?

A. Well, I was—I was at home at the time and it was around about 11:30 or maybe about 11:30 or so in the afternoon and I had went over at the store that was just—that was just on the other side of my apartment and I did go to the store and I did get some alcohol from there.

[43] Q. You are talking about 11:30 in the morning?

A. In the afternoon, yeah.

Q. What was the purpose in getting the alcohol?

A. That I was planning on just—I did want to start early in the afternoon because I knew that it was going to be—that there was going to be a—wait a minute.

Q. Take your time.

A. That I was going to celebrate the new year. So I just did start—I just did start early.

Q. Who in all was with you when you initially started?

A. There was this girl named—her name was—her first name is Alice Meinier and there was him over there.

Q. Him meaning?

A. Pregent.

Q. Were you planning a party basically?

A. Yeah.

Q. Again, you said this started around 11:30 or 12:00?

A. Yeah, it was between there.

Q. How long would you say this party lasted?

[44] Well, the only thing—well, it lasted until I did go out, you know, because of the alcohol which it lasted from 11:30 in the afternoon until about—until about five after twelve that night.

Q. Who was there at your party?

A. Well, there was—like I said, there was, there was people in and out, you know. There was—like Alice was there the whole time.

Q. How about Pregent? Was he there basically the whole time?

A. Yes, he was there.

Q. How about Robert Crain?

A. Yes, he was there, too.

Q. Basically the whole time for him?

A. Yeah.

Q. Who are some of the other people that were either there the whole time or in and out?

A. There was this girl named Ida Mae Stevens was there and this other guy named—his first name is Paul something. I forgot his last name.

Q. Paul?

A. Yeah, Paul and there was this other guy there named—his first name—I can't pronounce it. [45] Scotty Burns he was there.

Q. Scotty?

A. Yeah, and there was, as you know there was her there, too.

Q. Her is who?

A. Epps, Miss Epps was there.

Q. When did she first come there that day?

A. She came there—it was like—it was the first thing early, first thing early in the morning.

Q. Was this before you went out and got the liquor?

A. Yes.

Q. What was her purpose in being there then?

A. Well, this guy knew that I had to be out, right, and so he knew I was moving, but this woman that was out hunting for this place to move into and so she did come up to my place and ask me about it.

Q. About moving in your apartment?

A. Yes.

Q. Did she leave at this point?

A. Yeah.

Q. Did she come back later?

A. Yeah. Yes, sir.

Q. Just approximately how many people would you [45(a)] say all told were at your party either that were there the whole time or came and went?

A. At least between nine and eleven, twelve people.

Q. I might have just asked you this. What time did she come back, Mrs. Epps?

A. Miss Epps came back between 4:00 and 4:30.

Q. Was the defendant at your party?

A. No, he wasn't. At that time, he wasn't.

Q. Did he come later?

A. Yes, he did.

Q. At some point did you all have a meal?

A. Yes, we did.

Q. When in relation to when Mrs. Epps was there did you have a meal?

A. Well, she got there around, between, as I said, 4:00 and 4:30 and we all did eat around 4:30.

Q. What was it that you all ate?

A. We ate some meat, pork chops and some other food. I can't pronounce it.

Q. Spaghetti?

A. Yeah. Yes, sir.

Q. What did she do in relation to that meal?

[46] A. She did help with it, you know.

Q. When did Robert VanArsdall come in relation to this meal you had? I take it you only had the one meal?

A. Yeah, that's all we had the one meal.

Q. Where was the meal cooked?

A. Over at his apartment.

Q. Pregent's?

A. Yes, Danny Pregent's apartment.

Q. Where did you eat the meal?

A. We ate at his house.

Q. Would it be fair to say the party was back and forth between both of your apartments?

A. Yeah.

Q. You all were drinking?

A. Yes, sir.

Q. When did VanArsdall come in relation to the meal?

A. I ain't going to say that he was there at the meal.

Q. Do you remember him coming in?

A. Yes, I remember him coming in but I can't say that I can say that that was after the meal.

Q. Do you remember anything that he was wearing at [47] the time?

A. The only thing I remember him wearing was this big army jacket.

Q. Did he stay the rest of the evening after he came?

A. No, he didn't.

Q. Do you remember how long he was there?

A. He came to my apartment and he was only there maybe, maybe at the longest fifteen minutes, at the longest.

Q. Do you remember any other highlights happening, the order they happened that evening?

A. That evening?

Q. Yes, say, after he left, Mr. VanArsdall.

A. Well, there was these other people still there. There was a guy named, as you did say, explain his name. His name is Robert Crain was there and he was there with these other people and I left.

Q. What did you leave for?

A. I did go back over at the store because I do think that we was out of alcohol. So I had gone back over for more.

Q. You went back over to the liquor store?

A. Yeah, and I came back and so I did find—I [48] did find my apartment was all, you know, messed up because these guys was up there and they had this argument.

Q. Do you know what guys that was?

A. Yeah, it was Robert Crain, but this other guy I don't know too good.

Q. When you came back and found your apartment messed up, what did you do?

A. I did make everybody leave.

Q. Did anyone arrive at your apartment at that point, around that point?

A. Around that point?

Q. Yes.

A. No, because I ain't able to remember that.

Q. What time was it that you told everybody to kind of leave your apartment?

A. This was around fifteen of ten or 10:30.

Q. Do you remember seeing a Mark Mood at your apartment?

A. Yes, I do.

Q. When did he arrive?

A. He arrived—he arrived just before that happened in my apartment, you know, with them guys getting into the argument.

[49] Q. Did you tell him to leave your apartment?

A. No, I didn't.

Q. Who if anyone was left in your apartment? You said you threw everybody out, let's say, around 10:00 o'clock.

A. Yes.

Q. Who was in your apartment after you in effect threw the rest of the party out?

A. There was Alice and Mark Mood.

Q. What did you all do for the rest of the evening?

A. We just sat there between us three and just sat there and just got more higher on the alcohol.

Q. Did you leave your apartment at any point?

A. Yes, I did.

Q. What time was that about?

A. It was around 11:00. I had gone over there to his apartment.

Q. His is again who?

A. Danny Pregent's apartment, and the door was already open and so I just like walked over there and just like with my head around the corner.

Q. Let me break in a minute. Could it have been later than 11:00?

[50] A. Yeah, it could. Well, all right, yeah, it could have been between 11:00 and 11:30.

Q. You went in and what did you see?

A. I just seen him on the edge of the bed and I seen his feet hanging from the bed.

Q. Whose feet?

A. Danny Pregent's feet hanging from the bed. I mean, that's all I could see was about from here (indicating) down.

Q. What part of the bed would Pregent have been on?

A. He was like on the end of the bed like this-away (indicating), on the end of it.

Q. And you said you saw who else sitting on the bed?

A. Bobby VanArsdall.

Q. Did you see anyone else in the apartment at that point?

A. No, I didn't.

Q. Did you see Doris Epps?

A. No, I didn't.

Q. Can you say whether she was there or not?

A. No.

[51] Q. Could she have been there and you missed her?

A. Yes, sure.

MR. WILLIAMS: Objection Your Honor. That is cumulative. He has already asked that question.

THE COURT: Objection sustained.

BY MR. REED:

Q. I am going to hand you a diagram which has been marked State's Exhibit 2. Would you take a look at this. If I represent to you this is a rough diagram of the bed and there is a figure with his head, a circle indicating his head with a "P" and that is supposed to be Daniel Pregent—

A. Yes.

Q. —is that the area you saw him in?

A. Yeah.

Q. Would you please with a "V" indicate where on this particular bed you saw Robert VanArsdall?

A. Sure.

(The witness marked the diagram.)

MR. REED: I would ask that you hold this up, if there is no objection, and show the jury.

BY MR. REED:

Q. Where were you standing when you had this [52] view?

A. Well before you have to go in his apartment you have to go down one step and I just like had this leg—well, on the one step I had this one foot and as you got to walk in his door it does open up thisaway (indicating). So I had my hand up here like this (indicating) and I just like had my head around the door.

Q. Were you able to get a complete view of the bed?

A. No.

Q. Were the lights on in the room?

A. Yes, there was.

Q. Were the lights on in the kitchen?

A. Yeah.

Q. What was the status of the lighting in your apartment?

A. They was out.

Q. Why was that?

A. Because I had mine off.

Q. After you got this view, did you talk to either of the individuals at this point?

A. No, I didn't.

Q. After you had this view, what did you do?

[53] A. I just did turn around and just went back in my apartment.

Q. Was Alice and Mark still over there?

A. Yes, they was.

Q. What do you remember happening next?

A. Well, that is it. Then about five after twelve I went out you know.

Q. What do you mean you went out?

A. I just did go to—I was on my couch and I just did—I did pass out.

Q. Why do you remember this? How do you know it is five after twelve?

A. Because I could hear the New Year's things going off because every year in town they do ring these bells.

Q. What type of bells is this?

A. It is just bells, you know.

Q. What is the next thing you remember after passing out?

A. I passed out. I remember that girl was beside me. Alice she did reach over here on my cheek and said Happy New Year's and that is it.

Q. And you passed out. I take it you woke up at [54] some point?

A. Yeah, I did.

Q. What do you remember happening at that point?

A. I just did have a whole house full of, you know—I did look at all these cops was in my house.

MR. REED: Thank you. I have no further questions, Robert. Defense may have some questions for you.

CROSS-EXAMINATION

BY MR. NICHOLAS [defense counsel]:

Q. Good afternoon, Mr. Fleetwood.

A. How you doin'?

Q. Mr. Fleetwood, how old are you?

A. Twenty-one.

Q. Were you twenty-one on December 31st of last year?

A. No, I wasn't?

Q. How old were you then?

A. Twenty years.

Q. On the 31st of December, 1981, were you living with anyone at that apartment?

A. No, I wasn't.

Q. You testified that sometime on the morning of the 31st Robert Crain came to your apartment; is that [55] correct?

A. Well, yeah, because he always has been at my apartment, you know. He always has been there, you know.

Q. You know him well?

A. Yes, I do.

Q. What time did he arrive?

A. What time did he arrive?

Q. Yes.

A. That is hard to tell you because he was in and out.

Q. Well, can you approximate what time he arrived in the morning?

A. In the morning?

Q. Did he arrive in the morning?

A. I ain't sure because he always comes and goes, you know. I mean look, it has been awhile since I have, you know, since I have been going through this. So it is going to be a little hard to have this all up in my mind.

Q. I understand that. You testified that the party began at approximately 11:30 to 12:00 o'clock; is that correct?

A. Yes, sir.

Q. Was Robert Crain there before the party started?

[56] A. As I said, he might have been.

Q. So you don't know?

A. No, I don't know that question.

Q. Was Alice Meinier there?

A. Yes she was.

Q. What time did she arrive?

A. Well, she did arrive before 11:30.

Q. When Doris Epps came up to your apartment for the first time, was she with anyone?

A. Yes.

Q. Who was she with?

A. This guy named—his first name is—

Q. Steve?

A. Steve Harris.

Q. Did you know who she was at that time?

A. No, I didn't.

Q. You never met her before that day?

A. No, I hadn't.

Q. You testified that she returned to your apartment between 4:00 and 4:30 p.m.; is that correct?

A. Yeah. Yes, sir.

Q. Was she with anyone at that time?

A. No.

[57] Q. Who was there when she came back in your apartment?

A. That is hard to tell because, as I said, there was people in and out, but I do know I was there and there was Alice was there.

Q. At that time were there also people at Pregent's apartment?

A. Huh?

Q. At that time were there also people in Pregent's apartment?

A. I can't answer that question either.

Q. Did you in fact ask Doris Epps to stay for the party?

A. Yeah, I did.

Q. So she was there at your invitation?

A. Yes, sir.

Q. You testified that sometime after she returned the second time you all had supper together; is that correct?

A. Yes, we did.

Q. And you had supper in Danny Pregent's apartment?

A. Uh-huh (affirmative).

Q. And that is where it was cooked?

[58] A. Yes, sir.

Q. And you had pork chops and spaghetti?

A. Yes, sir.

Q. Where did the pork chops come from?

A. From the store.

Q. Didn't they in fact come from you?

A. Yeah.

Q. From your apartment?

A. Yeah.

Q. Did Alice Meinier take those pork chops over to Danny's apartment?

A. Yeah, because, as I said, I didn't have any on and I did have a stove to where you had to use electricity. So we had to use his.

Q. Was your testimony that Mr. VanArsdall arrived sometime after the meal was eaten; is that correct?

A. Uh-huh (affirmative).

Q. Do you have any idea whether he was with anyone when he came?

A. Yeah, he was.

Q. Who was he with?

A. He was with a guy—he was with a guy named Paul Berghorn.

[59] Q. Paul Berghorn?

A. Uh-huh (affirmative).

Q. Was he also with Scotty Burns?

A. Yeah, I think so.

Q. Anyone else?

A. No, I don't think so.

Q. When he left, did he leave with anyone?

A. Yes, he did leave with Paul and the other guy Scotty Burns.

Q. So he came in with the two of them and left with the two of them?

A. Yes.

Q. And it was your approximation that he was there maybe fifteen minutes?

A. Yes.

Q. During that time was he talking with anyone?

A. I can't answer that question.

Q. You didn't have a chance to observe him?

A. I can't answer that question either because everybody was with everybody. You know what I mean?

Q. Well, was he in Mr. Pregent's apartment and over in yours?

A. He was in mine as far as I know.

[60] Q. Mr. VanArsdall was in your apartment?

A. Yeah.

Q. Was he in Danny Pregent's apartment?

A. Well, after he did leave I didn't know what he did.

Q. So you don't know if he was or not?

A. That is true.

Q. Now, you testified that you were drinking. When did you begin drinking that morning?

A. Between 11:30 and 12:00 o'clock.

Q. What were you drinking?

A. Alcohol.

Q. What kind of alcohol?

A. I can't pronounce it. Liquor.

Q. Hard liquor?

A. Yes, sir.

Q. Did you have a lot to drink?

A. Yes, sir.

Q. Now, between the time—this may be hard for you to estimate—but between the time that Doris Epps arrived and the time you passed out that night, how many times would you say you had gone over to Danny Pregent's apartment?

[61] A. Maybe two.

Q. Maybe two, and that includes when you went over there to eat?

A. No, that don't include that, no.

Q. So it might have been three?

A. Yeah. It was three, yes.

Q. Was Alice Meinier with you the whole time that day?

A. Yes, she was.

Q. Did she eat supper over to Danny's, too?

A. Yes, sir.

Q. So she was with you in Danny Pregent's apartment every time you were there?

A. Huh?

Q. She was with you in Danny Pregent's apartment every time you were there?

A. Yes, she was.

Q. And were the two of you at anytime in the living room of Danny's apartment?

A. I ain't able to answer that question. I do not remember that part.

Q. Do you know if you were in his kitchen?

A. Yes, we was.

[62] Q. Were you in his bathroom?

A. Yes, we was.

Q. Now, it was your testimony that somewhere along the line Ida Mae Stevens showed up; is that correct?

A. Yes.

Q. How long have you known her?

A. I have known her for a very good few years.

Q. So you certainly knew who she was?

A. Uh-huh (affirmative).

Q. Can you estimate when she arrived?

A. No, I can't.

Q. Was it after supper?

A. I don't know that question.

Q. After she arrived, did anything unusual happen involving her and Danny Pregent?

A. Well, they was out in the hallway arguing. That is all I know. There is a hallway that divides his apartment and my apartment, but yet it does add into this other

hallway. So you got to walk through this one doorway to be in his hallway.

Q. So you heard them out in the hallway arguing?

A. Yeah.

Q. Where were you when you heard them?

[63] A. I was in my apartment.

Q. Did you come out of your apartment?

A. Yes, I did.

Q. Were they continuing to have an argument out in the hallway?

A. Yes, they was.

Q. Was there anyone else with you in the hallway?

A. There was him with me. There was Robert with me, Robert Crain.

Q. Did you and Robert Crain have to restrain Danny Pregent?

A. Yes, we did.

Q. Was that because he was threatening to fight or beat Ida Mae Stevens?

A. Yeah.

Q. And in restraining him, did he kick a hole in the wall?

A. Yeah.

Q. You saw that?

A. Yes, I did.

Q. Did he also attempt to punch the walls?

A. Yes, he did.

Q. Had he ever punched on walls before that day to [64] your knowledge?

A. No.

Q. Do you know whether or not Mr. Pregent was involved with the disturbance in your apartment?

A. No, I don't.

Q. You don't know?

A. No, I don't know.

Q. Could he have been?

A. Well, when I did come back he wasn't in my apartment.

Q. Was anyone in there?

A. Yes, there was.

Q. Who?

A. There was Robert Crain and these other guys that he knew.

Q. Sometime that night did you and Alice Meinier leave the building?

A. Leave the building?

Q. Yes.

A. No, we didn't leave the building. Yeah, wait a minute. We did leave to go over at the store. That is about it.

Q. Can you estimate what time that might have [65] been?

A. Between 10:00 and 10:30.

Q. When you got back, wasn't Mark Mood in your apartment at that time?

A. Yeah.

Q. Was he there alone?

A. No, he was there with Robert Crain and his friends.

Q. Your testimony is that sometime after your return you asked everyone to leave your apartment except for Mr. Mood; is that correct?

A. Well, there was Mood and her was with me, Alice was with me.

Q. Who did you ask to leave?

A. Robert Crain and his friends.

Q. Apparently your testimony is then that after that time you and Alice Meinier and Mark Mood sat in the apartment drinking?

A. Yeah.

Q. How long did you sit in the apartment and drink?

A. Well, as I said, I went over at the store between 10:00 and 10:30. So then that's how long that we [66] was, us three was there. As I said, between 10:00 and 10:30 until five after twelve. That is when I can't remember.

Q. Do you have any idea where Robert Crain was at that time?

A. No, I didn't.

Q. Isn't it true that sometime between 10:00 and 10:30 you went over to Danny Pregent's apartment and looked in and saw Robert Crain and Danny Pregent putting Doris Epps to bed?

A. No, I didn't see that.

Q. That is not true?

A. No.

Q. So it is your testimony then that the only time that you went back to Danny Pregent's apartment was approximately 11:00 o'clock to 11:30?

A. Yeah.

Q. And at that time you saw Danny Pregent, Doris Epps and Mr. VanArsdall; is that right?

A. No, I didn't.

Q. Who did you see that time?

A. I seen Robert VanArsdall on the edge of the bed and I seen his feet hanging from the bed as if he was [67] on his back laying back on the bed.

Q. When you say his feet, do you mean Mr. Pregent?

A. Yeah, Danny Pregent's feet.

Q. What was he wearing on his feet?

A. That is all I did see was shoes.

Q. And you never had occasion to go back the second time?

A. Huh?

Q. You never went back a second time to Mr. Pregent's apartment?

A. No, I didn't.

Q. Did you testify that the lights were on?

A. Yes, I did.

Q. Which lights were on?

A. There was every light was on in the house: bathroom, kitchen and there where he was.

Q. That would be the living room?

A. Yes.

Q. The bathroom door was open?

A. Yeah, it was.

Q. Was the radio on?

A. I can't recall that.

Q. Was Danny Pregent covered with anything?

[68] A. I can't answer that.

Q. How long were you back in your apartment until you passed out?

A. Well, as I said, I went over there to his apartment between 11:00 and 11:30. So I had to go over there between 11:30, 11:00 and 11:30 and I was over there. Until five after twelve, that is when I passed out.

Q. After you and Alice and Mark Mood were there in your apartment, did Danny Pregent ever come over to your apartment?

A. No.

Q. How much did Alice have to drink that day?

A. I don't know.

Q. Was she drinking?

A. Yes, she was.

Q. Was she also drinking hard liquor?

A. Yes, she was.

Q. Had she been drinking all-day?

A. I can't answer that question because it is hard to tell how much she had to drink.

Q. Did she start drinking in the morning with you?

A. Yeah, I would say so.

[69] Q. So you never saw Doris Epps in bed; is that correct?

A. That is true.

Q. When you saw Mr. VanArsdall, how was he dressed?

A. How was he dressed?

Q. Yes.

A. He did have on his clothes.

Q. What kind of clothes?

A. I don't know what that question is.

Q. When is the last time that evening you saw Doris Epps?

A. Doris Epps? I can't answer that question. The last time I can remember is that we was eating and that was around 4:30.

Q. The last time you saw her was around 4:30?

A. Yeah. I am saying that is what I am able to remember.

Q. Mr. Fleetwood, on or about the 6th of August, 1982, were you arrested and charged by the State of Delaware with a violation of 21 Delaware Code Section—

MR. REED: Objection, Your Honor. May we approach the Bench?

THE COURT: Yes.

[70] (Side bar conference not reported.)

THE COURT: I will ask the jury to step out for a minute while I decide a legal question.

(The jury left the courtroom.)

THE COURT: Counsel come forward.

(Side bar conference not reported.)

THE COURT: We will ask the witness to step out for just a minute.

(The witness left the courtroom.)

(Side bar conference not reported.)

THE COURT: Would you get the Rules of Evidence from the law library.

(Side bar conference not reported.)

THE COURT: Bring in the witness, please, and it is requested by the State we are going to have a voir dire of

the witness before we proceed with any questioning on the issue of possible impeachment relating to arrest and the disposition of that.

(The witness returned to the witness stand.)

THE COURT: Sir, they are going to ask you some questions outside the presence of the jury and we will proceed whenever the defendant is ready to proceed.

MR. NICHOLAS: Thank you, Your Honor.

[71] (Voir Dire Examination:)

BY MR. NICHOLAS:

Q. Mr. Fleetwood, do you have any bias or interest that has caused you to give the testimony that you have given here today, any bias?

A. I have got bias? What does that mean?

Q. Do you think you are going to get anything or have you gotten anything—

A. No, I got nothing.

Q. —out of the testimony you are going to give here today?

A. No, I haven't gotten nothing.

Q. On or about August 6, 1982, of this year were you arrested for being drunk on the highway?

A. Well, I ain't sure about August 6th, but, yes, I had been uptown and I did get locked up for it.

Q. To your knowledge is being drunk on the highway a criminal charge? You said you were locked up for it.

A. I was locked up for it?

Q. Is that what you said?

A. No, I didn't say that.

Q. Were you arrested?

A. Yes, I was.

[72] Q. Is being drunk on the highway a criminal violation to your knowledge?

A. A criminal violation?

Q. Is it against the law?

A. Oh, yes, sure it is.

Q. And on or about August 20, 1982, the 20th of August, was an information filed against you in the Court of Common Pleas for Kent County on the charge of being drunk on the highway?

A. That means what?

THE COURT: Regarding charges. Were charges brought against you in the Court of Common Pleas?

THE WITNESS: Yes.

BY MR. NICHOLAS:

Q. Were you further required to appear in the Court of Common Pleas for trial?

A. Yes, I was.

Q. Did you have to post a bond?

A. I posted a bond—

Q. In order to not be locked up?

A. Yeah, I did have to post a bond.

Q. Did you appear in court on August 31, 1982?

A. Yes, I did.

[73] Q. Did you have an attorney?

A. Yes, I did.

Q. Was that particular charge against you being drunk on the highway dropped?

A. Yes, it was.

Q. Didn't the State enter what is called a nolle prosequi that day dropping that charge against you?

A. I do not know what that means.

Q. The charge was dropped; is that correct?

A. Yeah, it was dropped.

Q. Did you and your attorney have any discussion with the prosecutor before this charge was dropped?

A. I can't answer that question because I was in the courtroom and I was told that it was dropped. So I don't know if my attorney did speak with the man.

Q. Isn't it a fact that you agreed or your attorney on your behalf agreed that in exchange for this charge being dropped against you that you would appear the next morning in the Attorney General's office to discuss this case?

A. Yes, it was.

Q. Did you comply with that agreement? Did you go?

[74] A. Yes, I did.

MR. NICHOLAS: Your Honor, I would like to at this time enter as Defendant's A, for Identification the certified copy by Ruth Biddle, clerk of the Court of Common Pleas, to the record in the case of which I am referring to. It was number 82-08-0021.

THE COURT: Hand it up to me. What did you want? The fact of the record here?

MR. WILLIAMS: Yes, Your Honor.

THE COURT: Can we agree it was dismissed?

MR. REED: Yes, we can.

THE COURT: You have a notice of nolle prosequi here. It is stipulated without this paper going in the record. For the record here so it is a part of the record—

MR. NICHOLAS: For purpose of voir dire only.

THE COURT: For purposes of voir dire only at this time. There was a notice of nolle prosequi entered on the charge of Title 21 Section 4149 against Robert J. Fleetwood and the clerk of the Court of Common Pleas is requested to note the same on record. Reason: Insufficient evidence, signed by D. C. Reed, August 31, 1982.

Can everyone agree and stipulate that was [75] done?

MR. REED: Yes, Your Honor.

THE COURT: Proceed.

BY MR. NICHOLAS:

Q. Mr. Fleetwood, did your conversation with the Deputy Attorney General have any bearing at all on the testimony you have given here today?

A. I don't understand quite what you mean.

Q. Well, you said before that you didn't expect to get anything out of testifying here today. Is that still your answer to that question?

A. Yes. I tell you because the only reason I am here is because I got to be here.

Q. Is that because of the conversation you had with the Attorney General?

A. No.

MR. NICHOLAS: I don't think I have anything further on voir dire, Your Honor.

BY MR. REED:

Q. Shortly after this offense occurred, January 1st, did you give a statement to the Smyrna Police, particularly Detective Bowers?

A. Yes, I did.

[76] Q. Did you tell him everything you knew happened?

A. Yes.

Q. Do you think you told him basically what you have testified to today?

A. Yeah, I do.

Q. The fact a charge, a misdemeanor charge was dropped against you in the Court of Common Pleas has that affected your testimony in any way?

A. No.

Q. Have you lied today because of that?

A. No, I haven't lied.

Q. What was your understanding of why the charge was dropped?

A. Well, I did understand that I did feel that you wanted to make sure that I knew what I was talking about and I do feel that you wanted to make sure I had my story together before coming in here. So that is why I did feel that it was dropped.

Q. Is that charge, the charge being dropped or your interview in the office?

A. Yeah, just the interview in the office.

Q. Would you have come into the office for an [77] interview whether the charge was dropped or not?

A. Yeah.

Q. Do you remember whether you were given an Attorney General's subpoena to appear at my office?

A. Yes, I was.

Q. Did you respond to the office in response to that?

A. Yes, I did.

Q. Anyone tell you to lie?

A. No.

Q. And you have testified the way you have testified today because the charge was dropped?

A. No.

MR. REED: I have no further questions, Your Honor.

MR. NICHOLAS: Your Honor, I don't have anything further on voir dire.

THE COURT: Did you feel because the charge was dropped any pressure on you to change what you felt was the true story in any way whatsoever?

THE WITNESS: No, sir, because when I was coming in this courtroom I had my mind that I wasn't going to hide nothing from nobody and I wasn't going to be making [78] up no lies.

THE COURT: Back in August when the charges were dropped, do you feel they were dropped because it was expected for you to change your story of what you felt to be the truth in any way?

THE WITNESS: No.

MR. NICHOLAS: Your Honor, may we approach the Bench?

THE COURT: Yes.

(Side bar conference not reported.)

(End of Voir Dire Examination.)

THE COURT: We will ask the witness to step out at this time.

(The witness left the courtroom.)

THE COURT: We have completed the voir dire. State have any objections, comments?

MR. REED: State objects on the ground of relevancy and any remote relevancy the voir dire has shown no relevancy, no bias and to whether this witness' testimony has been affected by a misdemeanor charge being dropped in the Court of Common Pleas. He has not laid a foundation for that.

It is our position any remote relevance at all [79] on the question of bias is outweighed by the prejudicial effect and confusion of the issues in this particular case as to this witness' testimony, and I might add defense has shown nothing as to or can prove nothing as to how this witness' story differs particularly from the time he told this to Detective Bowers.

MR. NICHOLAS: Your Honor, I don't think it is incumbent upon the defense in cross-examination to prove that the stories differ or do not differ. I think that first of all the evidence is relevant as defined by 401 of the Uniform Rules of Evidence, relevant to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

THE COURT: The issue is whether or not by 403 which states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by consideration of undue delay, waste of time of needless presentation of cumulative evidence." That is the issue to be decided by the Court.

MR. NICHOLAS: That's correct, Your Honor. I think one rule has to be balanced against the other and [80] I think they both come within the constitution ambient of whether or not this defendant is entitled on cross-examination to inquire into bias and it is the defendant's position that that kind of inquiry is an essential element of his right to confrontation of witnesses.

It is the defendant's position that it doesn't really matter at this point how he answers these questions. The

jury is the trier of fact. The jury is entitled to determine whether they think there is any bias or there isn't any bias. I think there is a sufficient showing on the record that there might well be.

He testified somewhat differently when questioned by me than when questioned by the State and the issue here I think falls within four squares of, or nearly four squares of Wintjen vs. State Delaware Supreme Court decision decided at 398 At. 2nd 780, 1979 decision. I think that this kind of inquiry is critical to allowing the defense a probing effective cross-examination. I don't think that the danger of prejudice is unfair to the State here.

The issue is is the jury going to find this witness believable or not, and the defendant ought to be entitled to inquire into that area out of this witness' mouth and let the jury make up its mind whether it finds [81] his story credible or incredible.

THE COURT: The ultimate fact, so the record is clear, you are trying to show here is bias of the witness by the fact he was arrested and, therefore, because of the fact of the arrest and the nolle prosequi and he feels pressure to testify favorably for the State. Isn't that what you are trying to show?

MR. NICHOLAS: We are trying to show bias was created as a result of the arrest and that of the charge being dropped, and we are trying to show there was some connection in the witness' mind between that charge being dropped and between his being told to appear in the Attorney General's office the next morning in relation to this case and that was his testimony. He did answer yes, and at one point he did say something about thinking that

he had to show up over there at the Attorney General's office as a result of the charge being dropped. We are not, of course, trying to impeach his credibility by showing simply that he was arrested. There is more to it than that.

THE COURT: Counsel come forward.

(Side bar conference not reported.)

THE COURT: Any further comments by counsel?

MR. NICHOLAS: No, Your Honor.

[82] THE COURT: Objection sustained based upon the Rule 403.

MR. NICHOLAS: Your Honor, can we enter this as an exhibit at this point?

THE COURT: We have stipulated to everything that is in it. I am just trying to keep the paperwork out. If you want it in the record —

MR. NICHOLAS: Yes, I think at this point we would like it in the record.

THE COURT: The State is willing to read the whole thing and stipulate the whole thing.

MR. NICHOLAS: Simply for the purposes of the record for voir dire.

THE COURT: Counsel.

(Side bar conference not reported.)

THE COURT: Will counsel also stipulate for the purpose of the record that on August 6, 1982, a bail bond was filed. On August 20, 1982, an information was filed

and on August 20, 1982, a plea of not guilty was entered, jury trial requested and on August 31, 1982, a nolle prosequi, the Attorney General requested a nolle prosequi be entered for insufficient evidence.

MR. REED: So stipulated.

[83] THE COURT: Bring in the jury, please.

That stipulation is only for the purpose of the voir dire questions, the admissibility of the arrest.

MR. NICHOLAS: Your Honor, before we get the witness —

(Side bar conference not reported.)

THE COURT: Defense counsel outside the presence of the jury and outside the presence of the witness has indicated another line of questioning he wants to go into. We are having a side bar, and I am going to ask defense counsel to indicate what that line of questioning is at the present time.

MR. NICHOLAS: Very well, Your Honor. The line of questioning would be to inquire of this witness whether or not he in fact had been questioned by the Smyrna Police Department with regard to the murder of one Anthony Blake which murder took place on August 21, 1982. Specifically, the line of inquiry would be whether or not Detective Bowers, the chief investigating officer in the Epps' slaying, did not in fact pick Mr. Fleetwood up, take him to Anthony Blake's funeral and in the hearing of Anthony Blake's mourners and relatives questioned Mr. Fleetwood with regard to that murder investigation.

[84] Further, the line of questioning would then be whether or not as a result of that interrogation and any other interrogation which may have taken place whether Mr. Fleetwood considers himself now to be a suspect in that murder and whether or not considering himself to be such he has any bias or interest in giving the testimony he has given here today.

As a wrap-up, I suppose, Your Honor, he would be questioned as to whether or not he has been offered any favors, inducements, promises or deals with reference to that investigation in exchange for the testimony he has given here today. That is all, Your Honor.

MR. REED: The State would object on the ground of relevancy for all those questions and our basic position is even if he considers himself a suspect, again, we are talking about Rule 403 whether there is any remote probative value there and I contend on its face and on its face alone merely being a suspect does not say one way or the other whether you are going to be biased. You can be just as biased against the State. In fact, if he does consider himself a suspect, assuming that arguendo, and that would create unfair prejudice, confusion of issues, misleading of the jury to the true issues in the case.

[85] THE COURT: They have a last question they want to ask him. Whether or not any —

MR. NICHOLAS: Favors, inducements, promises or deals have been offered with reference to that investigation in exchange for his testimony here today.

MR. REED: I would have no objection to that question being asked on voir dire because I feel it should be

asked on voir dire because it is almost a fact of bringing in this other murder case by the back door to put it out in front of the jury at this point.

THE COURT: Bring in the witness, please. I am going to ask the last question.

Court will be recess for ten minutes.

(A recess was here taken.)

THE COURT: You may call the last witness to the stand, please.

(The witness returned to the stand.)

THE COURT: On the voir dire would defense counsel please ask the witness the last question.

(Voir Dire Examination:)

BY MR. NICHOLAS:

Q. Mr. Fleetwood, what favors, inducements, promises or deals have you been offered by either the State or [86] the Smyrna Police Department with reference to the investigation of the murder of Anthony Blake in exchange for your testimony here today?

A. None.

MR. REED: Your Honor, I object to the form of that question. I am confused. I am asking it be rephrased. Has he been offered any inducements, et cetera, in connection with your testimony today?

THE COURT: Have you been offered anything?

THE WITNESS: On what?

THE COURT: On anything?

THE WITNESS: No, I haven't been offered nothing.

MR. NICHOLAS: Favors, inducements, promises or deals.

THE COURT: Have you been offered any inducements, promises or deals —

MR. NICHOLAS: With reference to the investigation of the murder of Anthony Blake in exchange for your testimony here today?

THE WITNESS: No, I haven't.

MR. REED: Your Honor, I have no questions.

(End of Voir Dire Examination.)

[87] THE COURT: We are now ready to argue the point. Proceed.

MR. REED: I think the point is answered. There is nothing to ask at this point.

THE COURT: Defense have any comments?

MR. NICHOLAS: Yes, Your Honor. I think once again the defendant is entitled to show by a probing cross-examination whether this individual considers himself now to be a suspect in that murder investigation and whether he considers that it is important for him to cooperate with the Attorney General's office or the police department with reference to that investigation vis-a-vis the testimony he has given here today.

Again, I don't think it matters how he answers that question that has just been asked. I think he should be asked all the questions I indicated in the line we requested

so the jury can determine whether or not there is any bias in this witness' mind as a result of his considering himself to be or to have been a suspect in that investigation. It is up to the jury to decide whether he is credible, and the defendant is entitled to inquire into this area to show that and, again, Your Honor, I beg the Court's pardon, I think this also comes in the Wintjen vs. [88] State.

THE COURT: Based upon the questions presented, comments by counsel at the previous argument on a previous point, the questions answered by this witness, the state of the record at the present time, the State's objection is hereby sustained on the entire line of questioning.

How long do you anticipate it will take to complete your questioning?

MR. NICHOLAS: Your Honor, I would anticipate five to ten minutes.

THE COURT: Bring in the jury, please.

(The jury returned to the courtroom.)

CROSS-EXAMINATION, Cont'd.

BY MR. NICHOLAS:

Q. Mr. Fleetwood, you indicated on your direct testimony that you returned to your apartment sometime around 12:05 a.m.; is that correct?

A. 12:05?

Q. At five minutes after twelve midnight.

A. I was passed out at five after twelve. I was already in my apartment.

Q. Didn't you testify that you knew that you passed out at approximately 12:05 because you heard the [89] New Year's bells ringing?

A. Yeah.

Q. How long did those bells peal? How long did they ring?

A. It just rang That is all I heard.

Q. What kind of bells were they?

A. They were just bell from like a—

Q. Church?

A. Church bells.

Q. Were they one set of bells of two?

A. I don't know how many sets there was.

Q. Well, were bells ringing all over town?

A. Yeah.

Q. Ringing all over town. Did any whistles blow?

A. I don't know about no whistles.

Q. Can you estimate whether those bells were loud?

A. Yeah. I think they was loud enough for me to hear them.

Q. So you could clearly hear them?

A. Yeah.

Q. That is how you knew what time it was?

A. Yeah.

Q. Because you knew that that was New Year's Eve [90] and the bells would ring at 12:00 midnight?

A. Right.

MR. NICHOLAS: I have no further questions, Your Honor.

MR. REED: No redirect, Your Honor.

THE COURT: You may step down. Thank you.

MR. REED: May this witness be excused subject to recall?

THE COURT: May the witness be excused?

MR. NICHOLAS: Yes, Your Honor.

THE COURT: You may be excused. Thank you.

(The witness stepped down.)

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(The jury left the courtroom.)

THE COURT: May I see counsel at side bar, please?

(Side bar conference not reported.)

MR. NICHOLAS: Our request, Your Honor, is for expedited copy of the testimony of Robert Fleetwood which I understand is different from daily copy. The purpose of making a request is that we may review his testimony for purposes of calling other witnesses, possibly to impeach that testimony. We were not aware that his testimony would be what it was today and we would like to have that copy so we may call other witnesses on the defendant's case.

THE COURT: Request denied. Anything further?

MR. NICHOLAS: I don't think so, Your Honor.

MR. REED: Nothing.

THE COURT: Thank you. Tomorrow morning at 10:00 o'clock. Do you want to leave first?

(The defendant left the courtroom.)

Direct and Cross Examination of
Alice Jane Meinier

Volume I at 5-6, 9-28, 59

[5] September 16, 1982
Courtroom No. 1
10:00 o'clock a.m.

PRESENT: As before noted.

THE COURT: Are we ready for the jury to come in?

MR. REED [prosecutor]: Not yet, Your Honor. Before we start, I have two witnesses here today: Howard Fortner and Bruce Timmons, who should be brought in and put under sequestration.

THE COURT: You have only one?

MR. REED: I have one coming in at 1:00 and we have another one that was put under sequestration yesterday.

THE COURT: Do you have enough to go through the whole day?

MR. REED: Can we approach the Bench?

THE COURT: All right.

(Side bar conference not reported.)

THE COURT: If you will bring the witnesses in, please.

MR. REED: That will be Alice Meinier. You don't want Fortner and Timmons yet?

THE COURT: Yes, bring them in also.

[6] (Witnesses entered the courtroom.)

THE COURT: Counsel come forward to side bar, and take this down. You are under sequestration which means that you must not talk to anyone about the case. There was some question as to whether or not you were talking with Mr. Fleetwood yesterday after the Court was over. Were you talking about anything that he may have testified to?

MS. MEINIER: No.

THE COURT: You have had no discussions with him about his testimony or anything dealing with the case?

MS. MEINIER: No.

MR. WILLIAMS [defense counsel]: Thank you, Your Honor.

THE COURT: Would the two officers come up, please.

MR. REED: Patrolman Timmons and Patrolman Fortner.

THE COURT: Gentlemen, you have been subpoenaed as witnesses in this case. You are under sequestration. I am going to give you specific instructions about what sequestration means.

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[9] DIRECT EXAMINATION

BY MR. REED:

Q. Would you state your name one more time, please.

A. Alice Jane Meinier.

Q. What is your address?

A. 436 Ronald Lane, Smyrna.

Q. Do you know one Robert Fleetwood?

A. Yes.

Q. Were you at his apartment December 31, 1981?

A. Yes.

Q. Do you remember approximately when you went there?

A. Between 12:00 and 1:00.

Q. That would be —

A. In the afternoon.

Q. Again, approximately how long did you remain there? Would it be fair to say you remained there most of the day?

A. Yes, I was there —

MR. WILLIAMS: Objection, Your Honor. That is a leading question.

THE COURT: I didn't hear your objection.

MR. WILLIAMS: It is a leading question, [10] Your Honor.

MR. REED: It is a leading question admittedly, Your Honor, but it is merely in the way of introductory-type testimony. It is not crucial.

THE COURT: I will allow the question. Proceed.

BY MR. REED:

Q. How long were you there?

A. The entire day.

Q. Who else do you remember being either in that apartment or in the area of that apartment, the Fleetwood apartment, during that day?

A. Bobby Crain, Michael Crain, a blond girl, I can't remember her name, Ada, I think or Ida, Danny.

Q. Danny is who?

A. Pregent.

Q. What was his relation to this area?

A. He lives across the hall.

Q. Who else do you remember either coming and going or staying?

A. Mark Mood and the girl that lives upstairs stopped in.

Q. Did you know all the people that were there?

A. No.

[11] Q. About how many people would you say were there, again either that stayed or that left?

A. Probably thirty or forty.

Q. Where did you spend most of your time that day?

A. In Bobby Fleetwood's apartment.

Q. What basically was going on in the area?

A. Well, in the afternoon they were just sort of getting together and stopping in to see each other. Mrs. Epps came between 1:00 and 2:00 to look at the apartment.

Q. Did she come back or did she stay?

A. She stayed, I gather.

Q. Now, up to that point did you know Mrs. Epps at that point?

A. No.

Q. Was dinner served later that evening?

A. Yes.

Q. Do you remember approximately what time that was?

A. I would say about 6:30 or so.

Q. About how many people were at dinner?

A. Maybe twenty-five.

[12] Q. Where was that dinner served?

A. In Danny Pregent's apartment.

Q. What did you have for dinner? Do you remember?

A. Spaghetti. She had made spaghetti.

Q. She being who?

A. Miss Epps, and also pork chops.

Q. What do you remember happening after dinner?

A. After dinner Danny — I was across the hall and Danny came out of his apartment.

Q. This being Danny Pregent?

A. Yes, and he was very angry and Bobby Crain was holding him and he knocked quite a large hole in the wall board.

MR. WILLIAMS: I am sorry, Your Honor. I can't hear the witness.

THE COURT: If any member of the jury at anytime cannot hear, please raise your hand immediately.

MR. REED: Would you please try to keep your voice up so everyone can hear.

BY MR. REED:

Q. What did you say? You said he knocked something.

A. Pardon me?

[13] Q. What did he do?

A. He knocked a large hole in the plasterboard in the hall.

Q. Do you remember Mark Mood, Mark Mood arriving?

A. Yes.

Q. Did you know him before that night?

A. No.

Q. What time approximately did he arrive?

A. Between 10:00 and 10:30.

Q. Where did he arrive, at Pregent's or Fleetwood's apartment?

A. At Bobby Fleetwood's.

Q. Was there anybody else in Fleetwood's when he arrived?

A. Only myself.

Q. Was Fleetwood there?

A. Yes.

Q. Could you just explain the circumstances of his arrival, what you remember happening at that point?

A. He came about 10:30 and we just sat there and talked for an hour, hour-and-a-half.

Q. Did anyone leave the apartment once he arrived, and there is you, he and Fleetwood in that apartment.

[14] A. No.

Q. Did you leave at any point?

A. I left to see what time it was because there wasn't any electricity in Bobby Fleetwood's apartment. So I went across the hall to see what time it was.

Q. What did you do?

A. The clock was on the floor in the kitchen. So I went inside and looked at the clock and it was seven minutes of twelve.

Q. Seven of twelve?

A. Uh-huh (affirmative).

Q. Did you see a body in the kitchen at this time?

A. No.

Q. What was the condition of the lighting in the kitchen at this time?

A. The kitchen light was on and the bathroom light was on.

Q. How about the bedroom living room light?

A. That was completely dark.

Q. Did you look in there?

A. No.

Q. I am going to hand you a photograph partially [15] blocked out at the bottom. Do you recognize what this is a photograph of?

A. Yes, this is the clock that was on the floor.

Q. Is this the position the clock was in when you went into the kitchen?

A. Pretty much so, yes, but I do not remember any laundry basket at all.

Q. Would you mark with an X, a large X where you were when you went into the kitchen at this point to look at the clock?

(The witness marked the picture.)

MR. REED: Your Honor, I would ask this picture be marked for identification at this point as State's E, I believe.

THE COURT: It may be marked E, for Identification.

MR. WILLIAMS: Your Honor, may defense counsel examine the photograph?

THE COURT: All right.

(Photograph marked, "State's Exhibit E, for Identification.")

MR. REED: I might add it is only being marked for identification, Your Honor.

[16] THE COURT: All right.

BY MR REED:

Q. You looked at the clock. What did you do at that point?

A. The door was open when I went in. It was unlocked. I looked at the clock and went right back out, shut that door and also the door that goes out from the hall to the other hall and I went back to the other apartment.

Q. Back over to what apartment?

A. To Bobby Fleetwood's and I said it's seven minutes of twelve.

Q. Who was over there again at this point?

A. Mark, Bobby and myself.

Q. What do you remember happening next?

A. Next thing I heard bells or chimes went off which was I presume at midnight.

Q. What was Fleetwood doing around this time?

A. He went to sleep about five minutes after that, five or ten minutes.

Q. Did you go to sleep?

A. No.

Q. What did you do?

[17] A. I sat and talked to Mark.

Q. What happened later?

A. About an hour, an hour later, hour-and-fifteen minutes — I can't be sure because of the electricity, but there was a knock at the door.

Q. Could you keep your voice up, please.

A. There was a knock at the door.

Q. The door to what?

A. Bobby Fleetwood's apartment. There was a knock on the outer door because I had locked the outer door and the inner door and I asked who it was and they said it's Bobby. So I opened the door.

Q. Why did you open the door?

A. I thought it was Bobby Crain who I know.

Q. What happened next?

A. He came in and he went over and sat in a chair by the window.

Q. How would you describe this person's appearance at this point?

A. He was very tall. He had on a light blue shirt which was splattered with blood and he had a jacket with him.

Q. What type of jacket?

[18] A. A green car coat, army-type jacket.

Q. Do you remember the length of his hair?

A. Past the collar.

Q. He came in and sat down?

A. Yes.

Q. Where did he sit down?

A. He sat in front of the window but with his back towards the window so the lighting — I couldn't see as well as if he had been sitting the other way.

Q. Let me break in for a moment. Would you examine this object and let me know if that has any significance to you?

A. That is the way the shirt looked.

Q. That is the way the shirt looked?

A. It looked as though you had had a nosebleed. It wasn't full-blooded, just splattered.

MR. REED: You can put that back in the bag.

Your Honor, I would ask at this point that this shirt be marked State's F, for Identification.

THE COURT: It will be marked State's F, for Identification.

(Shirt marked, "State's Exhibit F, for Identification.")

[19] BY MR. REED:

Q. Would you continue from what you remember happening when he went over and sat in the chair.

A. He sat down and he put his hands out and they were all bloody.

Q. How did he put his hands out?

A. (Indicating.)

MR. REED: Let the record indicate he put his hands out palms forward.

BY MR. REED:

Q. Would you continue, please.

A. He said he had gotten in a fight and at that point he said — I don't know the exact words — something to the effect of —

MR. WILLIAMS: Your Honor, we object. If she doesn't know the exact words, she shouldn't testify.

MR. REED: Your Honor, I don't know any rule of evidence that says somebody cannot testify to what they remember.

THE COURT: Objection overruled. Proceed.

THE WITNESS: He said but I got them back.

BY MR. REED:

Q. Would you continue, please.

[20] A. That is the first time I saw the knife.

Q. You saw what?

A. That is the first time I saw—when he said I got them back he, in his right hand, I believe, had a knife.

Q. Do you remember what the knife looked like?

A. It was a long knife.

Q. What type of edge? Do you remember that?

MR. WILLIAMS: Objection, Your Honor. That is a leading question.

THE WITNESS: Serrated.

MR. REED: I don't think that is a leading question, Your Honor.

THE COURT: I will allow the question. Proceed.

THE WITNESS: The type knife that you would slice tomatoes with. It was serrated.

BY MR. REED:

Q. What happened at this point?

A. I said, "That's a lethal weapon, Bobby. You better get rid of that because it's not safe" and Mark stood up and took the knife away from him. I don't know if he had seen—Mark was sitting in the dark over in the corner. Mark took the knife away.

Q. You say you don't know whether he had seen [21] Mark at this point?

MR. WILLIAMS: Objection, Your Honor. She can't testify as to what is in someone else's mind.

MR. REED: Your Honor, she stated she doesn't know.

THE WITNESS: Yes.

THE COURT: Objection sustained. Proceed.

BY MR. REED:

Q. Would you continue, please. You said Mark got up.

A. Mark got up and Mark took the knife and he put it in the sink in the kitchen.

Q. Who put the knife in the sink in the kitchen?

A. Mark Mood.

Q. Where did he get the knife from?

A. He took it from Bobby and I said, "Go wash your hands."

Q. You said that to who?

A. Bobby VanArsdall. He went in the bathroom and there wasn't any water pressure. So I said, "Well, wash them in the sink."

Q. Now, the bathroom, which bathroom did he go in?

[22] A. Bobby Fleetwood's apartment and I said, "Well, wash them in the kitchen sink" which is what he did and then he was washing his hands he said to me, "I think there's something wrong across the hall" and I said, "Well I'll go over and see. I was over there not too long ago."

Q. Would you keep your voice up just a little bit louder, please. What did you do?

A. I went across the hall. I opened both doors. I opened the door that leads into the Pregent apartment. I did not go down the two steps or one step, whatever. I just opened the door slightly and the same lights were on.

Q. In what room?

A. The kitchen and bathroom and I looked to the left and I just could see someone lying there from the knees down and I could see a lot of blood all around. So I slammed the door.

Q. Let me break in one time. You said you were in that room at seven of twelve?

A. Exactly by that clock.

Q. Had you seen the body at that point?

A. No.

Q. Would you have seen this body at this point?

[23] A. Yes.

MR. WILLIAMS: Objection, Your Honor. That is speculation.

THE COURT: Objection sustained. Disregard the last question and answer to the jury I am instructing.

BY MR. REED:

Q. Did you look in the area or were you in the area where you saw the body?

A. No, I just shut the door right away.

Q. What did you do?

A. Jumped back.

Q. What happened next?

A. I just—I got a little hysterical, I guess, and Bobby VanArsdall held on to me and he said, "It's all right" and I said, "Well, the person might still be in there."

Q. I am sorry. You said what?

A. I said the person might still be in there because that one room was still dark.

Q. What person were you referring to?

A. Well, I said there's something wrong. I was referring to the person that might have hurt that person.

Q. What happened at this point?

[24] A. Mark also went in. Mark went all the way in, Mark Mood.

Q. What did he do?

A. He left, went down the hall and down the steps to look for a policeman.

MR. WILLIAMS: Objection, Your Honor. She doesn't know what happened after Mark Mood left unless she went with him. I ask that answer be stricken.

THE COURT: Do you know of your own knowledge if he went down the hall? Is your objection about the fact he was going down the hall?

MR. WILLIAMS: No, Your Honor. I think she testified he left the building and went somewhere. Unless she went with him, I don't think she is competent to testify to that.

MR. REED: I have no argument on that, Your Honor.

THE COURT: Objection sustained.

BY MR. REED:

Q. Did the police arrive?

A. Yes, right away.

Q. Approximately how long was it between your discovery of the body and the police's arrival?

[25] A. Maybe three or four minutes. One policeman arrived.

Q. I am going to hand you an object. What significance does this have to you?

A. That is the type of knife that was, he had in his hand. I remember it well because it was in the sink and I could see it better because he washed his hands which cleaned it off.

MR. REED: I would ask that this knife be marked State's G, for Identification.

THE COURT: Let it be marked State's G, for Identification.

(Knife marked, "State's Exhibit G, for Identification.")

BY MR. REED:

Q. What do you remember happening—do you remember who the police were that arrived initially?

A. Yes, Officer Timmons. He knocked on the door because the outer door was locked and I went down and let him in and he came up the steps and he went right in the apartment and I went down one step, but I did not go all the way inside.

Q. Did any other police arrive?

[26] A. Oh, yes.

Q. Any other police go into Fleetwood's apartment?

A. Yes.

Q. Did you show them anything in his apartment?

A. Yes, I took the police and I showed them where the knife was.

Q. Did you tell the police either at that time or later that morning what had happened?

A. That night I talked to Officer Timmons and I talked to Detective Bowers.

Q. Did you tell them what happened?

A. Yes.

Q. Would you look around the room and see if you recognize the individual?

A. Yes.

Q. Would you point the individual out, please?

A. Behind the pillar.

Q. With the brown coat?

A. Uh-huh (affirmative).

MR. REED: Let the record reflect the defendant has been identified.

BY MR. REED:

Q. The police got there. What do you remember [27] happening next?

A. Bruce asked me to stay out in the hall.

Q. This is Timmons?

A. Yeah, excuse me. He aked me to stay out in the hall and I stood there while all the police came in and I couldn't see too clearly because there is a double door there, but Bobby had stayed there. He didn't leave.

Q. Bobby—

A. Bobby VanArsdall had stayed there, and the only other things I saw was they went into Danny's apartment and brought Danny out.

Q. Danny Pregent?

A. Yes, and he had on a pair of slacks. He didn't have shoes on.

Q. Did you see what eventually happened to both VanArsdall and Pregent?

A. They were handcuffed.

Q. They were what?

A. Handcuffed.

Q. Where did this take place?

A. In the hallway.

Q. If you know, how does Daniel Pregent compare in size with Robert VanArsdall?

[28] A. Well, he is a very, very short person.

Q. He being who?

A. Danny Pregent is probably about five eight or five eight-and-a-half, maybe five nine. I don't really know, and Bobby VanArsdall is very, very tall. I'd say about six foot. I don't know.

Q. I am going to hand you a photograph. What does this photograph depict?

A. This is a photograph of the knife in the sink in Bobby Fleetwood's apartment.

Q. Is this a true and accurate representation of that?

MR. WILLIAMS: Objection, Your Honor. I don't see how the witness can identify that as being the knife in the sink in the particular apartment. My recollection that is a close-up of the knife.

MR. REED: Your Honor, that is a question of weight, not admissibility.

THE COURT: I will allow the question. Proceed. You may answer the question.

THE WITNESS: I recognize it because there were dishes in the sink.

CROSS-EXAMINATION

[59] • • •

Q. I understand it is a long time ago.

A. No, there weren't any clocks.

Q. There weren't clocks either. From that point in time, whenever that point in time may have been, did Robert Fleetwood leave his apartment at any point thereafter?

A. You mean after 8:00 or 9:00?

Q. Yes.

A. No.

Q. Whenever he put the people out, other than going next door to look at Mr. Pregent's clock at seven minutes of twelve, did you leave Robert Fleetwood's apartment at anytime?

A. No.

Q. You testified I believe that Mark Mood knocked on the front door at some point.

A. Between 10:00, 10:30.

Q. Was anyone with Mark Mood at that time?

A. No.

Q. How long was Mark Mood present in Mr. Fleetwood's apartment prior to Robert VanArsdall knocking on the door?

A. From either 10:00 or 10:30 until about 1:00.

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[40] Q. [Mr. Williams, defense counsel]. Is that the first time someone has ever refused to go on a date with you?

A. No.

Q. About how long were you at the Lewes Dairy Market parking lot?

A. Maybe forty-five minutes to an hour.

Q. What did you do after you left the Lewes Dairy Market parking lot?

A. She took me uptown to the Four Corners which is the intersection of Main and Commerce.

Q. Is that at or near the center of Smyrna?

A. Yes.

Q. Cheryl Foraker was driving?

A. Yes, she was.

Q. Whose car? Whose automobile was this?

A. It was hers.

Q. What did you do when you arrived at the Four Corners area?

A. She let me off and I went to Robert Cole's apartment.

Q. How far is Robert Cole's apartment from the Four Corners intersection?

A. It is only a few doors from there.

Q. What happened when you arrived at Robert Cole's?

A. He wasn't home.

[41] Q. What was the weather like at that point in time, do you recall?

A. It was rainy and very cold.

Q. What did you do when Robert Cole wasn't at home?

A. I was standing there thinking what to do next and I turned around and seen a light on in Pregent's kitchen.

Q. Can you see Daniel Pregent's apartment from Robert Cole's?

A. Yes.

Q. Do you have any idea approximately what time it was at this point?

A. It was roughly about 11:00—a few minutes after 11:30.

Q. How do you know it was a little after 11:30?

A. I looked at my watch.

Q. You had a watch on?

A. Yes.

Q. What did you do when you saw the kitchen light in Daniel Pregent's apartment?

A. I jumped the fence and went up the back stairs, knocked on the back door.

Q. How did you know the back stairs went into Mr. Pregent's apartment?

A. The second time there he showed me the back door. He said just in case Robert Cole ain't home, to come up the back [42] stairs.

MR. REED [prosecutor]: I couldn't hear that, Your Honor.

THE COURT: Will you repeat your last answer, please? Slide closer to the microphone if you want.

THE WITNESS: When I was at Pregent's the second time he said, he showed me the back door and said if Robert Cole was not home I could come up the back stairs.

BY MR. WILLIAMS:

Q. Can you describe these back stairs to Daniel Pregent's apartment?

A. They are wooden and partially enclosed at the top.

Q. What did you do when you went up the back stairs?

A. I knocked on the door.

Q. Did anyone answer the back door?

A. Pregent answered the door.

Q. Daniel Pregent?

A. Yes.

Q. How was Daniel Pregent dressed?

A. He had blue pants, T-shirt—I am not sure if he had a shirt on. I can't remember if he had any shoes or socks on.

Q. How were you dressed at that time? The same as in the morning?

A. Yes.

Q. Did Mr. Pregent invite you in his apartment?

[43] A. Yes, he did.

Q. What occurred next?

A. Well, we stood in the kitchen and I made a remark about being hungry and he said, "Go ahead and make a couple sandwiches."

Q. Was there a light on in any room other than the kitchen?

A. No.

Q. Did you, in fact, make some sandwiches?

A. Yes, I made two.

Q. What kind of sandwiches, do you remember?

A. They were peanut butter and jelly.

Q. Did you and Daniel Pregent remain in the kitchen?

A. He kept going into the living room, back and forth between the living room and kitchen.

Q. What did you do after you finished eating your peanut butter and jelly sandwiches?

A. The cat, he come into the kitchen and we was playing with that.

Q. Whose cat was that?

A. I believe it was Danny's.

Q. Was this a cat or a kitten?

A. It was a young cat between six months, to a year old.

Q. It didn't appear to be full-grown?

[44] A. No.

Q. Was Mr. Pregent in the kitchen when you were playing with his cat or kitten?

A. Yes, he was.

Q. Did you do anything else in the kitchen?

A. We stood there and talked for a while.

Q. Do you remember what you were talking about?

A. I believe we were talking about the cat. I think he was telling me how he found it or something like that.

Q. What did you do next after you were playing with the cat?

A. Well, he said, "Follow me to the living room" and I took my coat and went into the living room and he said if I wanted to, I could sleep here on the cushions.

Q. Was there a light on in the living room?

A. No.

Q. Where are these cushions you were referring to or where were they then?

A. They were laying alongside of the sofa bed.

Q. What did you observe when you entered the living room?

A. Sofa bed was out. There was someone on the bed.

Q. Was that individual on the bed covered or uncovered?

A. Covered.

[45] Q. Did you know who that individual was?

A. Not at that time.

Q. Did you subsequently learn the identity of the individual on the bed?

A. It was Doris Epps.

Q. What happened after you entered the living room?

A. I put my coat in the corner by the bed, sat on the sofa and I asked Danny if he wanted a drink. He went and got two glasses. I poured the rest of the bottle into the two glasses.

Q. What were the two of you drinking?

A. Southern Comfort.

Q. What did you do next?

A. The cat come running in and went up the back of the sofa and I sat on the corner of the bed, playing with it for a little while and it took off.

MR. REED: I have to object again. I cannot hear what the defendant is saying.

THE COURT: Will you speak up a little bit louder.

BY MR. WILLIAMS:

Q. Try moving this up a little bit, Bob. Try to talk right into that if you can, please.

I think we are at the point where you were saying you and Danny Pregent had a drink and then the cat came in.

A. Yes.

[46] Q. What happened when the cat entered the living room?

A. The cat went on the back of the sofa bed. I sat on a corner of the bed and played with it for a little while 'til it went off into the room somewhere. I sat back down on the cushions.

Q. Where were the cushions?

A. They were alongside the bed.

Q. Are these the cushions for the sofa bed?

A. Yes.

A. Do you remember which side of the bed the cushions were on?

A. They were on the side of the bed nearest the door which would be the left side of the bed if you are standing at the foot.

Q. If you were facing the bed, which side, the right or left?

A. Left.

Q. What did you do after you sat down on the cushions on the floor?

A. We sat down and talked.

Q. Who were you talking to?

A. Danny Pregent.

Q. How long did you continue to talk to Danny Pregent?

A. I don't know. It was a while. He said he had to go do something. He left.

[47] Q. Do you know what Mr. Pregent was doing?

A. No.

Q. You said he left. Do you know if he left the apartment or not?

A. I don't. He just left the room.

Q. You don't know if he left the apartment or not?

A. No.

Q. What happened after Mr. Pregent left?

A. I was sitting there a few minutes and a person on the bed sat up and she asked me if I wanted to have sex. I said, "Fine." That's when I found out it was a woman.

Q. You didn't know who it was up to that point in time?

A. No.

Q. Had the individual on the bed said anything at that point in time?

A. No.

Q. Did the two of you, in fact, have sexual contact?

A. Yes, we did.

Q. What happened?

A. I took my shoes and my pants and shorts off. She took her pants and her shorts off. We had sex and I got

off the bed and I got dressed and sit back down on the cushions.

Q. Was there anything unusual about the bed? Did you observe anything unusual about the bed at that point in time?

[48] A. No.

Q. You sat back on the cushions.

What did you do next?

A. Well, I was sitting there smoking a cigarette and Danny come in and I asked him for a towel.

Q. Had Daniel Pregent been in the room when you and Doris Epps were in bed?

A. Not that I know of.

Q. Did Danny Pregent, in fact, give you a towel?

A. Yes, he did.

Q. Were the lights on in the living room at this time?

A. No.

Q. Do you recall what kind of towel or color towel it was?

A. No.

Q. Do you know where Mr. Pregent got the towel from?

A. No, I don't.

Q. Did he have to leave the room?

A. Yes, he did.

Q. What occurred next?

A. He brought me a towel. I wiped my hands off and gave it back to him. He left with it. I don't know where he put it. He just left the bedroom with it.

Q. Did Danny Pregent return to this living room/bedroom [49]area?

A. Yes.

Q. What occurred when Danny Pregent returned to the living room?

A. I was sitting down and we talked a little while more and I said I was tired and wanted to go to sleep.

Q. Did you, in fact, attempt to go to sleep?

A. Yes.

Q. Where did you attempt to sleep?

A. On the cushions.

Q. What did Danny Pregent do when you laid down on the cushions?

A. He laid on the bed.

Q. Was Doris Epps still in the bed?

A. Yes.

Q. Did you go to sleep on the cushions?

A. Yes, I think I did.

Q. What is the next thing you remember after lying down on the cushions?

A. There was movement on the bed.

Q. Someone was moving around on the bed?

A. Moving around on the bed.

Q. What did you hear?

A. Heavy breathing, people moving around on the bed and [50] the bed was squeaking.

Q. Did anyone say anything?

A. No.

Q. That you could hear?

A. Not that I could hear.

Q. Do you think you dozed off after that?

A. Yes, I believe I did.

Q. What is the next thing you recall?

A. That Danny—he got up and went into the kitchen and turned the light on.

Q. Turned the light on in the kitchen?

A. Yes.

Q. Did Danny Pregent return to the living room?

A. He returned a few minutes later.

Q. Did you know what he did in the kitchen? Could you see him?

A. No.

Q. What occurred after Daniel Pregent returned?

A. I was laying there and I fell off asleep. Next thing I know something was being drug by my feet.

Q. Was being drug by your feet?

A. I sat up and looked and Pregent was dragging Doris Epps by her wrists.

Q. Dragging her by her wrists?

[51] A. Yes.

Q. Had anybody said anything up to that point?

A. Not that I remember.

Q. Did you hear anything yell out or cry out?

A. No.

Q. Did Danny Pregent say anything to you?

A. No.

Q. Was the light on in the bedroom?

A. No, it wasn't.

Q. Was there any light on in the apartment at that point?

A. Just in the kitchen.

Q. Did you see Doris Epps?

A. Yes, I did.

Q. What did you observe?

A. She was limp and she just had her top on.

Q. What happened next?

A. When I asked him what was going on he hit me.

Q. Daniel Pregent hit you?

A. Yes.

Q. Where were you physically in the room in relation to Daniel Pregent when you were struck?

A. I was sitting on the cushions alongside the bed.

Q. You were sitting up on the floor?

[52] A. Yes.

Q. After you were hit by Mr. Pregent what happened next?

A. I had to sit there a few mintues to get my eyes cleared. I looked around and there was this—some dark stuff on the floor. It was wet. I had to put my shoes on. Went to the doorway in the kitchen.

Q. What did you observe when you went into the doorway in the kitchen?

A. Doris Epps lying on her back on the floor and Danny Pregent squatting over her.

Q. What was Daniel Pregent doing?

A. He was stabbing her.

Q. What was he stabbing her with?

A. Butcher knife.

Q. Did you actually see Daniel Pregent stab Doris Epps with a butcher knife?

A. Yes.

MR. REED: I am going to object to the leading nature of the question.

MR. WILLIAMS: Your Honor, I don't believe it is a leading question.

THE COURT: I will allow it. Proceed.

[53] BY MR. WILLIAMS:

Q. Did you actually see Daniel Pregent stab Doris Epps with a butcher knife?

A. Yes.

Q. How many times did he stab her, do you know?

A. Two that I seen.

Q. Can you describe those stab wounds for the jury?

A. One was under the rib cage and the other was in the heart area.

Q. Where were you standing at this point in time?

A. I was in the doorway.

Q. How far away from the body were you?

A. No more than maybe five or six feet.

Q. Where was the body?

A. It was roughly in the center of the kitchen.

Q. What did Daniel Pregent do after he stabbed Doris Epps twice?

A. He went along her neck and down her breastbone two or three times and then he just opened her up all the way down.

Q. You were watching this?

A. Yes.

Q. What did you do?

A. I was froze for a minute. I couldn't believe what was going on. I went up behind him and pulled him off. He twisted [54] on me and he knocked me down. I fell almost on her. I caught myself. My hand went right

about here (indicating) and slid a little. I was getting back up and he hit me again.

Q. You were struck by Daniel Pregent?

A. When I was getting up.

Q. Where was the knife, do you know?

A. At this time I don't know.

Q. How was Daniel Pregent dressed?

A. He just had pants on.

Q. He had no shirt on?

A. No shirt or shoes.

Q. Did he have socks on?

A. He was barefoot.

Q. After you were hit by Mr. Pregent in the kitchen, what is the next thing you recall?

A. The next thing I recall, I couldn't see that well because my eyes were blurry. He was coming out of the utility room and putting on his shirt.

Q. Where were you in the kitchen when you observed Daniel Pregent coming out of the utility room and putting on his shirt?

A. I was only sitting a couple feet from the body.

Q. Was there blood in the room?

A. There was blood all over the room.

[55] Q. Did you have blood on you?

A. Yes, I did.

Q. Did Daniel Pregent have the knife when he came out of the utility room?

A. No.

Q. Where was the knife?

A. It was in the body.

Q. Still sticking in the body?

A. Yes.

Q. Did Danny Pregent say anything to you?

A. No.

Q. Did he say anything unusual during this scuffle that you had in the kitchen?

A. He was just making animal noises and when he cut her open he just reached in with his hands and started pulling out guts and took a knife and started flicking stuff everywhere.

Q. What do you mean by "flicking stuff"?

A. He would stick the knife, stick it in and rip out and start flicking and throwing it everywhere.

Q. Was there blood flying around the room?

A. Oh, yes.

Q. What do you mean he was making "animal noises"?

A. Something similar to like a dog growling.

Q. Was he saying anything to you that you could [56] understand?

A. Not that I could understand.

Q. Did Daniel Pregent remain in the kitchen with you?

A. No. He walked into the bedroom.

Q. What did you do at that point?

A. I got up, pulled the knife out of the body. I walked into the bedroom after him.

Q. Why did you pull the knife out of the body?

A. I don't know.

Q. Was there blood on the knife?

A. Yes.

Q. What did you observe when you entered the bedroom?

A. Danny Pregent was lying on the bed.

Q. Was he covered up?

A. No.

Q. He was not covered up?

A. No, he wasn't.

MR. REED: Your Honor, objection. Leading questions.

THE COURT: All right. I will allow that one. Proceed.

BY MR. WILLIAMS:

Q. Was there any blood on Daniel Pregent before he went to the utility room?

A. Yes. It was on his chest, his arms and his bottom [57] of his pants. Like from the knees down.

Q. Did he have a great deal of blood or just a little blood?

A. He had a great deal. His chest was covered with blood.

Q. After you observed Daniel Pregent back in bed in the living room, what did you do?

A. I backed out of the bedroom and went across the hall and I took the knife with me.

Q. Why did you go across the hall?

A. To get help.

Q. What did you do when you went across the hall?

A. I knocked on Fleetwood's door.

Q. Robert Fleetwood's door?

A. Yes.

Q. Did anyone answer that door?

A. It was Jane Meinier who answered the door.

Q. What did Mrs. Meinier say to you?

A. She asked, "Who is it?," and I said, "Bobby."

Q. Did anyone open the door?

A. Jane Meinier.

Q. What happened after Mrs. Meinier opened the door of Robert Fleetwood's apartment?

A. She opened the door and let me in. I walked into the [58] kitchen and there was someone sitting in the corner by the couch and Robert Fleetwood was laying on the couch.

Q. Was Robert Fleetwood asleep or awake, do you know?

A. He was asleep.

Q. Who was sitting in the corner?

A. It was Mark Mood.

Q. Were there lights on in Robert Fleetwood's apartment?

A. No.

Q. Did you say anything when you entered Robert Fleetwood's apartment?

A. Not 'til I got to the center of the living room.

Q. What do you remember saying?

A. I said I got in a fight.

Q. Who had you been in a fight with?

A. Pregent.

Q. Did you say something about you had got him back or got them back?

A. Not that I remember, no.

Q. Do you remember what was said next?

A. I held my hand out for—the hand with the knife in it—and Jane Meinier, Mood, both reached for it and I don't know who got it.

Q. Someone took the knife from you?

A. Yes.

[59] What happened after the knife was taken from your hand?

A. I believe Mood took me to the window to see if it was cut and Meinier, she said go in the bathroom and wash my hands.

Q. Did you have blood on your hands?

A. Yes, I did.

Q. Did you give them the knife?

A. I just held my hand out and they both reached for it. I don't know who got it.

Q. Did you wash your hands in the bathroom?

A. No. There was something wrong with the sink. There wasn't water pressure.

Q. What did you do then?

A. Went to the kitchen sink and washed.

Q. Where is the kitchen sink in Robert Fleetwood's apartment?

A. It is in front of the door.

Q. The doorway is to the hall?

A. Yes.

Q. Was anyone with you while you were washing your hands at the sink?

A. Jane Meinier was standing to my left and Mark Mood was standing directly behind us.

Q. What happened while you were washing your hands, if anything?

[60] A. I said there was something wrong next door and Mark Mood left.

Q. Who did you tell that there was something wrong next door?

A. I said it to both of them.

Q. Mr. Mood left the apartment?

A. Yes.

Q. Did you see Mr. Mood again anytime that evening?

A. Not that I remember.

Q. What did you do after you washed your hands?

A. I followed Mrs. Meinier over to the door. She looked in and she just went hysterical.

Q. Which door is this now?

A. The door that opens up into the hall doorway that leads down to the — you got the bathroom, living room and kitchen.

Q. Are we talking about Robert Fleetwood's apartment or Daniel Pregent's apartment?

A. Daniel Pregent.

Q. Mrs. Meinier opened the front door and went hysterical.

A. The door was already open.

Q. Did she start crying?

A. Yes, she was.

Q. What did you do at that point?

A. I went around her and went into the kitchen.

[61] Q. What did you see in the kitchen?

A. The body was still there. There was blood everywhere. Her guts was hanging out.

Q. What did you do while you were in the kitchen?

A. I checked her wrist for a pulse. There was none.

Q. Do you know where Daniel Pregent was at this point?

A. I looked into the bedroom but I couldn't see where he was.

Q. What did you do after checking Doris Epps' pulse?

A. I left the apartment and went into the hall. I called for the police first because Jane Meinier was still standing in the doorway. She went running down the hall hollering for Mark.

Q. Mrs. Meinier went down the hall?

A. Yes.

Q. What happened next?

A. That's when I come out of the apartment and she was coming back down the hall. She was crying. I couldn't understand what she was saying.

Q. What did you and Mrs. Meinier do?

A. We went back into Fleetwood's apartment. She wanted to get Fleetwood up.

Q. What did she do?

A. She poured some water on him. She tried to shake him awake and she asked me if I could get him up. I shook him. I [62] couldn't get him up.

Q. Why were you trying to awaken Robert Fleetwood?

A. Meiner wanted him awake.

Q. Were you able to awaken him?

A. No, I wasn't.

Q. What is the next thing you recall?

A. I turned around and Meinier, she was standing by the sink. I walked over there and Officer Timmons went by the door.

Q. Was Officer Timmons in uniform?

A. Yes, he was.

Q. Did Officer Timmons speak to you?

A. No.

Q. Did Officer Timmons come into Robert Fleetwood's apartment?

A. Not at that time.

Q. Did he subsequently come into the apartment?

A. Later on.

Q. Did you remain in Robert Fleetwood's apartment?

A. Yes.

Q. How long were you there?

A. Maybe ten — fifteen minutes.

Q. When did you leave Robert Fleetwood's apartment?

A. When Officer Fortner asked me out into the hall.

Q. Why did Officer Fortner ask you out in the hall?

[63] A. Well, we were standing by the sink and Meinier said as plain as day, "Hide the knife. I think Bobby did it." She was referring to Robert Fleetwood. That's when Officer Fortner come in and shined his light around the corner into the sink and asked me to step out in the hall.

Q. Which sink was the knife in?

A. It was in the kitchen sink.

Q. Did you, in fact, step out in the hall with the officer?

A. Yes, I did.

Q. Was Officer Fortner also in uniform?

A. Yes, he was.

Q. What took place when you were out in the hallway?

A. I stood there a few minutes. I seen they brought Pregent out of the apartment. He was standing by the door with Montgomery and Timmons was down there. Officer Timmons and Officer Fortner, they were talking and then Officer Fortner, he come up and he told me to empty everything out of my pockets, put my hands on the wall and he frisked me down, handcuffed me and read me my rights.

Q. What did you observe about Daniel Pregent when he was brought out of his apartment?

A. Well, he looked like he didn't know what was going on. He was all disoriented.

• • •

[70] Q. Who was in the bed at that point?

A. Danny Pregent and Doris Epps.

Q. Did you stab Doris Epps?

A. No.

Q. Did you assist Danny Pregent in any way in the stabbing?

A. No, I didn't.

Q. Why did you go across the hall with the murder weapon?

A. Well, I wasn't going to leave it there with him. I didn't know how many knives he had there. I definitely wanted something with me if he ever got up.

Q. Do you know why Danny Pregent stabbed Doris Epps?

A. No.

MR. WILLIAMS: Your Honor, I have no additional questions of this witness at this time.

CROSS-EXAMINATION

BY MR. REED:

Q. Mr. VanArsdall.

A. Yes.

Q. Why again did you go across the hall with that knife?

A. I wasn't going to leave it there with him.

Q. Him meaning Pregent?

A. Yes.

Q. Now, I think you said something about protection for [71] yourself.

A. Yes. I definitely wanted something if he ever got up at the time.

Q. Do you know where he was at this point?

A. He was on the sofa bed.

Q. Was he covered?

A. No.

Q. So you took the knife. Where did you get the knife from?

A. It was in the body.

Q. Where in the body?

A. It was just above the pelvic bone.

Q. You took it across the hall so he couldn't get it?

A. Yes.

Q. Why was it again you didn't tell the police about Pregent's involvement the first time?

A. I didn't want to say anything that would get him in more trouble than he was already in.

Q. How many times did Pregent strike you?

A. Twice.

Q. Where did he strike you on your body, that is?

A. Roughly the neck area.

Q. How did he strike you? Was it a punch or a slap?

A. Punch.

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[78] Q. The Kool cigarettes found in the kitchen, were they yours by chance?

A. I don't know if they were.

Q. You said you took the knife across the hallway when you took it away from Pregent to have something to defend yourself?

A. Yes.

Q. Are you sure when you did that Pregent wasn't in the bathroom in his apartment washing up?

A. Yes, I am sure.

Q. Do you know when he washed up, if he did?

A. I don't know when he washed up really.

Q. Did you know who was across the hall?

A. All I know, Fleetwood was across there.

Q. When did you last see him?

A. The second time I was there.

Q. What was he doing at that time?

A. He was drinking.

Q. That's all you thought was across the hall was Fleetwood?

A. Yes.

Q. Are you sure you didn't go across the hall to kill him?

A. Yes, I'm sure.

[79] Q. How did you carry the knife across the hall when you went in there?

A. Carried it loosely in my hand.

Q. Just holding it out?

A. The blade was like this (indicating). Just loosely in my hand.

Q. Were you displaying the knife when you went in?

A. I just walked in there casually with it.

Q. You walked in there casually with it?

A. Sort of.

Q. What do you mean sort of casually with the knife?

A. I had it hanging down. My arm was hanging loose.

Q. Were you holding it by the blade or by the handle?

A. Partially blade, partially handle.

Q. Sort of in the middle there then?

A. Yes.

Q. Were you trying to hide it —

A. No.

Q. —as you went in there?

A. No, I was not.

Q. Why did you enter the apartment from the back door?

A. The back door is right across the fence from my friend's [Mr. Cole] front door.

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Closing Argument of Dana C. Reed,
Deputy Attorney General

Volume XI at 8-11, 15-22

[8] I have made no pretentions to attempt this, nor is it required. I do not think anybody to this day knows why Doris Epps was stabbed or actually how she was killed, and in what sequence, and so forth. This was a senseless crime, both during the crime and acts of the participants afterwards. A senseless crime. No rhyme or reason to it.

As far as who did the particular stab wounds or how many or what combination of either helping or inflicting the actual stab wounds by each of the two participants, Daniel Pregent or Robert VanArsdall, we will never know, because there are really only three people who could answer that question, two of them who are defendants, who may well be obviously biased in their view of what happened, and the third being Doris Epps. It is our contention, however, that the evidence shows, at the very least, that Robert VanArsdall was the most involved in this case, and I will explain that as I go along.

There are a lot of factors in this case that are disputed, but there is a bottom note as to what happened that is undisputed. That is, we have an undisputed murder in this case, the murder of Doris Epps, forty-seven years old, five foot four, one hundred five pounds. Dr. Tobin testified that she died of massive hemmorhage due to stab wounds of the [9] viscera, which included the heart, the liver and left lung. She had at least eighteen stab wounds of the incise kind, that is, the cutting across, and stab wounds of the puncture-type variety. She had three to the liver, incised wounds of the neck, two wounds of the heart, and,

as you remember, there was one entrance where Dr. Tobin testified that the knife went in, was withdrawn, and went right back in. It was obviously that entry wound where she found two stabs on the interior of the heart.

We have that long wound which goes from roughly the throat area all the way to the groin, and this was where the colon and intestines were protruding from when the body was found. We had three incised wounds of the vagina, stab wounds of the vagina, and one deep wound of the buttock.

In addition to this, among other things, you will have the autopsy report, if you care to read that, and you will have the pictures. Hopefully, you remember Dr. Tobin's testimony. You have the blunt-force injury to the left side of the victim's face, and a laceration to the left ear.

It may appear that I am being unduly gruesome, but the testimony was offered for a particular point, and I am offering it for a particular point. These wounds show there obviously was no accident. They show the conscious object [10] or purpose to cause death. We are not just talking about one isolated little nick. Let's just discount the blunt-force injury, and so on. We have eighteen different movements with a knife, and one of those eighteen movements is the long cutting which was the long wound.

A concerted effort. It speaks very heavily of the area of intent, and in addition to that, it is our contention that with that number of wounds, not just one person was involved. I am not saying that with that number of wounds one person could not do that, but if there were two people at the scene of that crime, two people participated with that number of wounds.

It was Dr. Tobin's testimony that the time of death was roughly between 12:00 o'clock and 1:00 o'clock, and that squares, basically, with the other evidence presented by the witnesses who had some contact with the scene. We also have, going back again to the issue of intent, not only the stab wounds to the body—and we do not know how many were missed—but we know there were two more. The sweater was cut. The bra was cut. The sweater was completely cut. Again, that is going to the issue of intent.

So we have the victim's body. That is undisputed. I am sure it is disputed as to how many people committed the [11] crime, but undisputed as to her injuries.

Another area, Robert VanArsdall is six foot two inches. How was he found? He was found at the scene of the crime. In fact, he goes into the Fleetwood apartment and is seen in this condition, and the police subsequently find him in possession of what we contend is the murder weapon, the serrated kitchen knife. We say it is the murder weapon, and, again, I do not think there is a dispute. The defendant himself admits taking this out of the body. But just to scientifically pinpoint this, we know the only blood is the victim's. A bloody mess. Along with a watch, a stain from the Fleetwood's door, and an ashtray, Dr. Lee was able to pinpoint exactly an antigenic marker and you will have that GLO-2 antigenic marker which belongs only to the victim. The rest of the items are consistent with her blood type.

We have, again, the defendant in possession of the murder weapon. Also the watch with not only blood on it, but human tissue. Again, this is surely after the crime. We know he had it over at Fleetwood's apartment. Bloody

hands. There is evidence of that from a number of factors, including State's Exhibit No. 37, the bathroom sink over at the Fleetwood's. You will have an opportunity to see this picture in the jury room. This will be the colored picture of the scene. Take a

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[15] Mr. VanArsdall's socks had the victim's head and pubic hairs on them. His pants had the victim's pubic and body hairs or hairs similar to hers. The defendant's underwear had her pubic hairs and sweater fibers on it. His blue shirt had the victim's body hairs on it. All those items had all that hair or those types of hairs.

Pregent's clothing, as far as hair and fiber, nothing on the plaid shirt. The Jockey shorts had no urine. No urine on his jeans. The shirt which we contend he wore at some point had the victim's pubic hairs and body hairs on it. This was the shirt in the trash can. The towel in the trash can in the bathroom had the victim's body hairs. The socks had the victim's body hairs or hairs similar to the victim's, which we contend are hers.

A brief chronology of what happened up until the body was discovered, as I am sure you are well aware of by now, is that we have the New Year's Eve party starting somewhere around noon in Fleetwood's and Pregent's apartments, with a number of people in and out during the day. We had spaghetti and pork chops for dinner. The defendant goes there. He leaves for a while, and then he comes back. At 11:25 Cheryl Foraker lets him off just down the street from this area. He has asked her out, and she turned him down.

[16] Daniel Pregent, according to the testimony, put Doris Epps to bed somewhere between 11:00 and 11:15. Some of these times may not exactly correspond, but they are pretty close.

Fleetwood testified that he went over to Pregent's and saw the defendant and Pregent between 11:00 and 11:30. He said he did not see Epps at that point, but he only got a shot of across the diagonal of the bed, and she could very well have been in the bed and he could have missed her.

Jane Meiner went over to look at the time at seven of 12:00. On State's Exhibit 58 you can see the clock she looked at. She marked the spot she was standing in. Down here (indicating) is where the body was. She saw no body when she went in to look at this clock at seven of 12:00.

Fleetwood passes out after he hears the bells of New Year's Eve. The next thing is that Meiner sees the defendant. He knocks on the door and says, "It's Bobby." He comes in the way I previously told you. She does not see the knife initially. She sees it in his right hand.

The defendant is arrested and taken into custody on the 1st of January. Early that morning he gives his first statement to the police. He contends today that he was confused in certain aspects in giving the statement. However, he was [17] not confused in his statement when he related to the police—and you will have a transcript of the January 1st statement, and you can also listen to the tape again—that he was at the New Year's Eve party there between 4:30 and 6:00 o'clock. He told them he ate spaghetti and pork chops. He said he had to walk to a friend's

house. We know that was a three- to four-mile walk to Cheryl Foraker's that night.

He said he was back to Pregent's around 12:00 o'clock. He walked up the back way, he said. He said he saw someone in bed. Pregent and he talked. He had a couple of sandwiches. He then laid down on the cushions. The next thing he remembered, he thought he was going to be sick. So he went out into the hallway.

Then he saw a blonde-haired lady out in the hallway. She went to Pregent's door. He followed her. She saw the body and became hysterical, he said. He went in and kneeled by the body. That was his explanation of how he got blood on him. He was trying to calm her down, and he was also trying to get Fleetwood up, he said.

These are all statements he said on the 1st. He did not use Fleetwood's bathroom, he said. He washed his hands in the kitchen. He denied having a knife at least five times in that statement. He says today that the reason he did that [18] is because he was scared.

There is no mention of sex between him and Doris Epps when he talked to the police. In fact, he never mentioned sex. In the second statement he said that the reason for this was that he did not want to get a related charge.

He, on this occasion, denied telling anyone he had been in a fight. He said he did not tell on Pregent because he did not want to get his buddy in trouble. This is what he said today, he did not tell on Pregent because he did not want to get his buddy in trouble. He said he lost his watch, and this is when he said the bruises on his knuckles —initially he denied having bruises on his knuckles. Then

he said it could have come from the cat. "I don't have any bruises on my knuckles." On the 3rd statement it changes somewhat. In fact, it changes in a rather important way. In his 1st statement he said he did not know what had happened.

This is the same as Daniel Pregent has been contending both of his statements. Remember, Pregent just does not know what happened. He thinks it is a jealous boy friend. He slept through the whole thing. That is what VanArsdall said in his first statement and even today contends in part.

In his statement of January 3rd, he says, "Pregent killed her." He said he got there around 11:30 and was [19] asleep, and the next thing he remembers is Pregent dragging her past his feet into the kitchen. Much of this is the same as his testimony was the other day. He then says he looked up and Pregent struck him on the back of the neck. The next thing he knows is he went into the kitchen and Pregent is in there cutting on her. He says he tried to pull Pregent off, but Pregent pushed him and he fell almost on top of the body. Pregent hit him again. He said he laid there a couple minutes, and Pregent had left the knife in her during this time. This is again his January 3rd statement. Then Pregent comes in from the sink. He has put his shirt back on, and then he laid down.

He said while the cutting was going on Pregent had blood on his chest and his arms. He said he picked up the knife and went across the hall. He admitted on the statement that he told the people across the hall he had been in a fight. He said he did not know why he took the knife out of the body. As far as sex goes, he said he was too tired for sex.

There is another statement of the defendant's that I do not believe is disputed, and this was the statement to Detective Fortner the morning of the arrest, the morning when the police discovered this incident, and that is when he said he got the blood on trying to help the woman. This was made [20] out in the hall before he was taken to the police station.

He disputes the statement made in front of Robert Montgomery of, "I didn't think it would go like this." He doesn't remember that statement. His testimony obviously differs, in the most important respect, from what he said on the first occasion and what he said on the second occasion. He now admits to having sex. He said he arrived and Pregent had his pants and shirt on. This is my memory, again, and my notes of what his testimony was the other day. Pregent told him he could sleep there. Someone was in the bed. He didn't know who. Both Pregent and he are sitting on the cushions drinking some Southern Comfort.

He talked with Pregent for a while. Pregent left the room for a while. While Pregent left the room, he said this person sits up and says, "Do you want to have sex?," and he says, "Sure." He removes his clothing. He did not mention his socks. I imagine he removed his socks. He said he removed everything else. They had sex. He does not know what happened to this person after that, and he says he put his shorts and pants back on in order to go to sleep.

Pregent brought in a towel. They talked a while longer. Then he attempted to sleep, and then at some point he noticed this body being drug by him, Pregent dragging it by the wrist. [21] He looks up and wants to

know what is going on, and Pregent pushes him in the back of the neck. He is out for a while. The next thing he does is he puts his shoes on and ties them up. They are tennis shoes. He goes out in the kitchen, and there he sees that gory sight with the stabbing area under the heart and under the rib cage. He tried to pull Pregent off. Pregent twisted and pushed him out. He punched him again in the back of the neck.

Bowers saw him on the 1st and 3rd, and there was no bruises except on the knuckles. At this point Pregent had no shirt or socks on, and he was making animal noises. The second time he was punched, he came to and he was momentarily dazed were his words. He looked up and Pregent has come out of the laundry room with a fresh shirt on. This was that plaid shirt that nothing was found on. No blood. But, remember, prior to this he says Pregent's chest, arms and the bottom part of him was covered with blood. He says again that he pulled the knife out and walked across the hallway with it to protect himself and to get it away from Pregent so Pregent would not do any more cutting.

Before he did that, however, he carried the knife into the bedroom where Pregent was. Of course, when he got over across the hallway someone got the knife away from him, [22] and put it in the sink. He also has a torn pocket on his blue shirt, because he was trying to put a packet of cigarettes in there.

This is the story the defendant on this occasion is asking you to believe. If you believe it, the defendant is not guilty, because he has not committed the crime. It is our contention, however, that just from a naked look at

the evidence, without even going into Dr. Lee's testimony, that the story is unbelieveable. To begin with, the evidence shows, in spite of the story, that there is no reasonable doubt as to the defendant's guilt as, at the very least, an accomplice in this case.

Before we get into even what Dr. Lee testified to as to how he believed or his theory of the crime was committed, and so forth, just compare—and you will have those items back with you in the jury room—the defendant's clothing with Pregent's clothing. Who was the most involved if you are going to compare clothing? On Pregent's pants the only contact is in the area of the knees down, the back and front. Only that type of pattern where a blood source comes into contact and you obviously have a great amount coming in and going into it. No splatters. No droplets. Nothing on his socks. The shirt had nothing on it, but we are not contending that he wore [it].

Closing Argument of William N. Nicholas, Attorney for Robert E. Van Arsdall

Volume XI at 30-43

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[30] All of these resources of the State are lined up against one man. It is an advantage.

Third—and it is obvious here again—at the close of the trial the State addresses you first. The State is going to have an opportunity to address you one more time after myself and Mr. Williams will talk to you. That means that the State is going to have the last word. So I would ask you all to please pay as much attention at this time as you have throughout the trial, so that we can do our best to address our remarks to you.

This has been a long trial. You have heard from many witnesses. There have been many delays. You have been in and out of the jury room innumerable times. I would like to take this opportunity to thank you all for your patience and thank you for doing your duty up to this point as jurors. You have been patient. You have paid strict attention to the evidence, and I am asking you now to just bear with us and hang on a little longer and to continue to do your duty until you are finished deliberating.

Essentially, the State has produced three different kinds of witnesses in this case. The first class or group of witnesses produced are people who have tried to give you some [31] background, either background about the party or background about the victim or background

about the events that led up to this incident. Generally speaking,—and I think it must be obvious to you—the problem with this entire class of witnesses is that none of them saw what happened. We do not have an eyewitness among any of those witnesses. All they are really able to testify to is what happened during the day of December 31st and what happened up to late that evening. None of them saw the crime.

Secondly, the State has offered testimony of various police officers. Naturally enough—and I think this is obvious too—they all arrived after the events. None of these individuals saw what happened. The police did the best they could under the circumstances. They did their job. They arrived and they made two arrests. Keep in mind, however, that they arrived after Doris Epps had been murdered.

Third, the State has produced two expert witnesses. The first of those was Dr. Judith Tobin, the Delaware State Medical Examiner. The second of those was Dr. Henry Lee. Dr. Lee based his opinion on physical evidence that he examined and certain photographs. Both of the State's experts told you they did not go to the crime scene. They did not inspect it.

[32] I would also like to take this opportunity, before going into what these various witnesses said, to tell you what is not in dispute, because I think that is important. There is no dispute between the State and the defense that late on the 31st of December, 1981, or in the early morning hours of the 1st of January, 1982, that Doris Epps was horribly and brutally murdered. There is no dispute about that. If the State has proven anything in this case, it has certainly proven that.

Someone intended to kill Doris Epps. This killing was no accident. It was a savage and brutal murder. That is not in dispute.

The defense does not dispute that Robert VanArsdall was in Daniel Pregent's apartment and he was there when the murder occurred. There is no dispute about that. We do not dispute that after Doris Epps was murdered, Mr. Van Arsdall left Daniel Pregent's apartment carrying the murder weapon. His clothing at that time was splattered with blood. You heard one of the witnesses testify that his shirt looked as though he had a nosebleed.

He walked across the hall carrying the murder weapon, and he knocked on Robert Fleetwood's door. There is no dispute as to that. The State has offered evidence to prove that is so.

[33] Nor do we dispute that after he entered Fleetwood's apartment and washed his hands, he told Mrs. Jane Meiner and Mark Mood that he had been in a fight, and he told them there was something wrong next door. There is no dispute as to that. None of these facts are in dispute.

Ladies and gentlemen, the only issue that is in dispute at this trial is whether Robert VanArsdall is responsible for the death of Doris Epps. That is the only thing that is in dispute. It is what you must decide. I should say that the burden is on the State to prove he is responsible for that death. That is what is in issue here.

Let's take a look at the first class of witnesses that the State brought on. These are witnesses whose purpose was probably to set the scene for you. The very first witness we heard from was Alvin Epps, the victim's husband. Ladies and gentlemen, we all feel sympathy for Alvin Epps.

There is no question about that. But your job as jurors is to try to put aside any sympathy that you may feel and to analyze all the evidence that you heard and analyze all the facts that you heard and to make a determination based only on that analysis and not on any sympathy that you may feel.

In fact, if you will think back that long ago, since he was the first witness that you heard, all he really testified [34] to was that he met his wife that morning. They have been separated for some time. She asked him to drive her downtown, and he did that. He dropped her off in front of 11 East Commerce Street, and that is the end of his involvement. He drove away. He said that he expected she might be at a party that he was going to later that night, but that is it. Alvin Epps really had nothing to offer you in trying to help you determine who is responsible for the death of his wife.

Next we have William Whittaker. He is the landlord. Both Daniel Pregent's and Robert Fleetwood's landlord. The importance of his testimony, it is our contention, is limited to just a couple of statements that he made, because they corroborate some things that other witnesses testified to.

The first of those two things is that William Whittaker noticed that a hole had been kicked in his hall, and there is a great deal of testimony about who kicked that hole in the hall. Mr. Whittaker went up there and found the hole and he had it repaired. The second thing Mr. Whittaker told you that I think is important is that when he went up to clean up Danny Pregent's apartment the next day or the day after the police had concluded their investigation, what does he find in the apartment but the

mattress? The mattress that you have seen photographs of. It is still in the apartment. He cannot [35] use it and he throws it away. He throws it in the trash. That is where that mattress is. It is not available as evidence because it is gone.

Next we have the first witness whom the State contends really can tell you anything. That is Cheryl Foraker. Miss Foraker testified that early in the day she had run into Mr. VanArsdall in the A & P and he asked her whether or not he could come out that night. She agreed, perhaps a little reluctantly, and he said, "Well, I will call you before I come," and she said, "Fine." Late that night or later that night he, in fact, goes out to her house, and he arrives there at approximately 9:00 p.m., according to her testimony, and he stays for an hour and a half. It is raining, and she agrees to drive him back into Smyrna, and she drives him to the parking lot of the Lewes Dairy, where the two of them, according to her, sit in the car and talk for about forty-five minutes.

She says that Mr. VanArsdall asked her for a date and that she would not go out with him. She refused to even take him up on his offer, and after that she says that she drove him to an area near the intersection of Main and Commerce Streets close to 11 East Commerce, and that is where she dropped him off.

The State will have you believe that Mr. VanArsdall [36] is so distraught and so frustrated at Miss Foraker's refusal to go out with him that somehow he immediately went up to Daniel Pregent's apartment and murdered Doris Epps, a lady he never laid eyes on before that day. Ladies and gentlemen, I submit that that just does not im-

port with the facts that you heard in this case, and it is ridiculous.

You heard the defendant testify that he was really not hurt by the way it turned out. You heard him testify it is not the first time he has been turned down. But you heard something more important than that. You heard Cheryl Foraker. Cheryl Foraker described him as a little bit upset. That is what she thought, a little bit upset. Does a little bit upset sound like you would describe somebody who just formed murderous intentions because he has been deprived of a date?

One last thing that Cheryl Foraker says is that she knew where Robert Cole lived. Keep Robert Cole in your minds, please, because you will hear some more about him a little later on. She knew where Robert Cole lived, and she knew he lived near Four Corners, the intersection of Main and Commerce Streets, and that is where she dropped Robert VanArdsdall off, near the residence of Robert Cole.

Ladies and gentlemen, none of the testimony that you heard from Mr. Epps or Mr. Whittaker or Miss Foraker adds a [37] thing to the State's case. Let's take a look at three witnesses who may be able to be a bit more informative. First of all, we have Robert Crain. These witnesses are people who were at the party.

Robert Crain's testimony is interesting because it sheds some light on the other individual charged in this murder, Daniel Pregent. Mr. Crain says that he arrived at 11 East Commerce Street sometime early in the day; that people were going back and forth between Pregent's and Fleetwood's apartments; that a party was going on; and that everyone was drinking. He remembers Doris Epps. He remembers that probably because he was the

one witness who had known Doris Epps before that day. He knew who she was.

What did he say about Mr. VanArsdall? All Mr. Crain had to say about VanArsdall is that he saw him arrive sometime in the afternoon and he saw him leave. Crain thinks that VanArsdall may have been there for an hour—this is early in the afternoon—at the most, and he did not see him again that evening. That is the one and only time that Robert Crain sees Robert VanArsdall on the 31st of December, 1981. That is it.

Crain leaves at 11:15, and he believes himself to be the last to go. When he leaves he says that Danny Pregent and [38] Doris Epps are lying together in bed. If you will remember, he said that Doris Epps was still alive when he left. The two of them are in bed together.

In reference to Mr. Pregent, what does Cain [sic] have to say? Crain tells you that he has to physically restrain Danny Pregent from attacking Ida Mae Stevens. He described it to you. He said he had to hold him, and while he was holding him, Pregent became so violent that he kicked a hole in the hall between the two apartments.

You may also remember another one of the State's witnesses who said something about this incident, Jane Meiner. Her description of Pregent was—and this was her word—"wild." "He was wild." You should also recall, with reference to Mr. Crain, that he counted for you and enumerated for you the number of people who were there. He said there were eight people. He said other than himself, his brother, Michael, was there, Ida Mae Stevens was there, Scott Burns, VanArsdall, Fleetwood, Jane Meiner, Danny Pregent, and he says Mark

Mood. So he told you exactly who was there, and I will get to why that is important shortly.

Think about the testimony of Robert Crain. Did he offer any testimony that implicates Robert VanArsdall in this killing? I suggest his testimony offers nothing to prove that [39] Robert VanArsdall was, in any way, responsible for this murder.

Now we come to Robert Fleetwood. Fleetwood, like Crain, testifies that there are eight to eleven to twelve people there—that is his recollection—and that the people are going back and forth between the two apartments, and they are drinking all day. As a matter of fact, he says that he and Mrs. Meiner start drinking about 11:00 o'clock in the morning and they are drinking hard liquor. He finishes his evening with Fleetwood, he said, at precisely 12:05, because he knows the bells rang. That is the last thing he heard before he passed out drunk.

In fact, he was apparently so drunk that later on when Meiner tried to awaken him by throwing water on him, she could not get him up. Mr. VanArsdall could not get him up when he tried. As a matter of fact, the police could not even get him up. They had to carry him out of the apartment. So he is obviously intoxicated.

Keep those facts in mind when you decide how you are going to judge the credibility of what Robert Fleetwood said, because he says that between the hour of 11:00 p.m. and whenever it was that he passed out, he saw something that is important to this case.

I should also, just to go back, remind you that it is [40] Robert Fleetwood who invites Doris Epps to this party. She is there because she comes to look at his apartment. He has been told to vacate because he is not paying his rent, and she comes up to look at his apartment. He asks her to stay. That is why she is there.

As to VanArsdall, Fleetwood recollects that VanArsdall arrived somewhere around 4:30 in the afternoon. He recollects he eats supper there, and he says, "I think VanArsdall stayed about fifteen minutes." That is the last that Fleetwood remembers of VanArsdall until later.

According to Fleetwood, after VanArsdall and Burns and Berghorn leave, the party continues to roll along until about 10:00 p.m. when Fleetwork says he goes out to get more liquor. When he comes back he says it is 10:15 or 10:30 and the fellow named Mark Mood had just arrived at Fleetwood's apartment. He says that Robert Crain and somebody else are in his apartment and the place was a mess. An argument had been going on in his absence, and he threw them all out. He threw everybody out except Mark Mood and Jane Meiner. Please keep that fact in mind.

Now we get to the crux of his testimony. This is the reason why you heard from this guy. He says at 11:00 p.m., [41] for some unexplained reason, he crosses the hall to Danny Pregent's apartment. He peeks his head around the door—he says he aims his head around the door. Those were his exact words—and he sees the feet of Daniel Pregent and he sees Robert VanArsdall sitting on the bed. The lights are on in the bedroom, he says. That is why he knows who was there, and he says he does not see Doris Epps.

I wonder how he could have seen VanArsdall in Danny Pregent's apartment at 11:00 o'clock when Cheryl

Foraker says she is with VanArsdall until 11:25? Which of the two that you find more credible, unless you are able to reconcile those two stories, is for you to determine. Fleetwood or Foraker?

Let's say he is just wrong about the time. He admits he is drunk. Maybe he is just wrong about the time. He does not explain why he decides to cross the hall and have a peek into Danny Pregent's apartment. He does not explain why he did not go in. He does not explain why he did not knock. He does not explain why he did not say hello. He does not explain anything. All he does is—for some reason that was never elicited—go across, peeks in, and goes back to his apartment.

One other thing that Robert Fleetwood did not explain to you is the discrepancy between his testimony that he crossed the hall and the testimony of Jane Meiner, because, ladies and [42] gentlemen, Jane Meiner testified that after Fleetwood threw everyone out of his apartment but for her and Mark Mood, it is her testimony that Fleetwood never left that apartment again the rest of the night. He was right there until he passed out.

She says she goes across the hall. She says she goes across to look at the clock to see what time it was, because there is no electricity in Fleetwood's apartment. But she testifies Fleetwood never left. You have to judge for yourself what Robert Fleetwood saw and what he did.

Saying that you do believe this testimony of Fleetwood's, what does it prove? It proves what he has never denied. It proves what he has already testified to in this trial. It proves that he was at Danny Pregent's apartment before Doris Epps was murdered. That is what it proves.

Once again, let's take a look at what this witness has to say about the other person charged with this murder, Danny Pregent. Fleetwood says that he hears Ida Mae Stevens and Danny Pregent out in the hallway arguing. According to Fleetwood, both he and Crain go out into the hallway, and it takes both of them to restrain Pregent. He says that is the time that Pregent kicks the hole in the wall.

Fleetwood also says that besides kicking a hole in the wall, Pregent is punching the walls with his fists.

[43] You think about this incident and whether, perhaps, it was not Danny Pregent who murdered Doris Epps and not VanArsdall. I suggest that you listen to the tapes of Danny Pregent. You will have them available to you. One of those tapes explains or tries to explain to Chief McGinty of the Smyrna Police Department that it is normal for people to pound walls with their fists. That is Danny Pregent's idea of normal behavior.

So now we have had five State witnesses. Two of them have told you about Danny Pregent's violence. Not one of these five have testified to any fact suggesting anything other than that Robert VanArsdall was in that apartment. None of them have offered you any evidence implying that he was responsible for the death of anyone or helped anyone kill Doris Epps.

Now we come back to the last of these witnesses who are setting the scene for you, Jane Meiner. Once again, Mrs. Meiner admits she gets to Robert Fleetwood's apartment sometime early in the afternoon. She begins drink-

ing. She is drinking 7 and 7's, I believe she testified. It is her testimony that the party is already going on when Doris Epps arrives, and she is there to look at Fleetwood's apartment.

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Closing Argument of John R. Williams,
Attorney for Robert E. Van Arsdall

Volume XI at 73, 91-101

[73] • • •

That is why there has been a trial before you ladies and gentlemen. So that Bobby VanArsdall can tell his side of the story. That is what he has done. That is what we promised you in the opening statement. Bobby VanArsdall took the witness stand and told you what happened. He was subject to cross-examination by the State. He answered the State's questions. This is the first opportunity that Bobby has had to answer the accusations against him before a fair and impartial group such as yourselves.

Bobby is not charged with being an evil person. You can no more condemn him for drinking alcohol or participating in casual sexual activities than you can for his beliefs, his race, or his religion. Obviously, Bobby should have been forthright with the police when he was interrogated by them on the morning of January 1, 1982, but that, at worst, is only hindering prosecution. That is not murder.

I asked Bobby when he testified, "Why didn't you tell the police what happened the first time?" His explanation was that he was scared. Plain scared. He is a twenty-two-year-old young man. He dropped out of school in the ninth grade. He had been drinking. He was arrested. He was placed in a cell at the Smyrna Police Department and then interrogated.

• • •

[91] • • • Cheryl Foraker admitted, "It might be inconvenient, because my friend was visiting from out of town, but I didn't tell him not to come." What does Robert VanArsdall do? He tries to call her before he goes out there. The line is busy, however. So Robert VanArsdall, unable to reach Cheryl Foraker, then proceeds to her home. He arrives. Cheryl Foraker was at home, her friends were at home, and her mother is there.

He spends some time at Cheryl Foraker's house. Cheryl Foraker drives him back into town. It is raining and cold at that point in time. They sit and talk in the Lewes Dairy Mart. There is an exchange with Robert VanArsdall where he asks her to go out, and she says, according to Mr. VanArsdall, that she is not ready at that point in time. She says he is a little bit upset. She then lets Mr. VanArsdall out at the Four Corners area. She places the time at approximately 11:25 p.m.

All of these details up to this point are obviously not that significant. What is significant—and it is significant because this is the only real witness who has testified who can tell you what happened from this point forward—is that Robert VanArsdall goes to the residence of Robert Cole. Robert Cole was not at home. Robert Cole's residence is in view of the back door of Daniel Pregent's apartment. Bobby [92] VanArsdall sees a light on in the kitchen of Daniel Pregent's apartment. He goes up the back stairs, knocks on the door, and is admitted into Daniel Pregent's apartment by Daniel Pregent.

They talk for a while in the kitchen. They eat a peanut butter and jelly sandwich and go to the bedroom. There is an individual on the bed. Robert VanArsdall does not know who it is. Daniel Pregent and Robert VanArsdall converse for a while. They have a drink of liquor. They play with the cat. The cat runs around the apartment and up on the bed, and Robert VanArsdall tells you he is sitting on the bed. The individual on the bed is wrapped up in a blanket.

At some point after that Daniel Pregent leaves the apartment. If you listen to the tapes of Daniel Pregent, he will tell you he leaves the apartment and he goes next door to Robert Fleetwood's apartment. That is Daniel Pregent's explanation. He says when he leaves there is nothing unusual. Doris Epps is on the bed and Robert VanArsdall, he says, is walking around. When he returns he also notices anything [sic] unusual. Doris Epps is apparently still on the bed. Robert VanArsdall is still walking around. That is the time when Daniel Pregent says he is out of the apartment.

Robert VanArsdall, in his testimony, is not sure if Daniel Pregent leaves the apartment or goes into another room [93] or where he goes. All he knows is for a time he is left alone in the living room-bedroom area. The individual on the bed either awakens or she has been awakened and has not said anything. She asked him if he wishes to have sexual relations. He gets into bed.

His testimony, as I recall it—and it is your recollection which controls—is that he takes his pants, shorts and shoes off, gets into bed, leaving some of his clothing on, and has sexual relations, and then he is back on the floor. Daniel Pregent then returns, and the next thing he knows, he is stretching out on the cushions on one side of the bed.

Daniel Pregent gets up at some point, goes out in the kitchen, leaves a light on in the kitchen, which I guess had

been turned on before, and returns back to the bed. Robert VanArsdall says he feels some movement on the bed. He does not know exactly what goes on, and he dozes off.

What occurs after that? He is awakened at some point while curled up on the cushions. How he is awakened is that someone is dragging a body by or near his feet. He starts to sit up. He sees it is Daniel Pregent dragging the body of Doris Epps. He told you the body was limp. He asked Daniel Pregent what was going on. Daniel Pregent does not reply. He hit him. Daniel Pregent hits Bobby VanArsdall while he is [94] seated on those cushions.

Bobby VanArsdall sits there for a second while Daniel Pregent continues to drag the body of Doris Epps out of the room. He says he has to put his shoes on. He notices something wet on the floor. He goes into the kitchen, and he sees Daniel Pregent. He already described what he sees in the kitchen.

After he succeeds in pulling Daniel Pregent away from Doris Epps, he gets knocked down by Daniel Pregent. He almost lands on the body of Doris Epps. His testimony was he thinks he gets hit from behind. He is down on the floor. He is not sure were Daniel Pregent is.

The next time he sees Daniel Pregent, Daniel Pregent is coming from the utility room. He is putting on what appears to be a clean shirt. There is some dispute, I guess, as to how or when or where Daniel Pregent might have washed up, because the testimony of Bobby VanArsdall is that Daniel Pregent had a great deal of blood on him when he was stabbing and cutting the body of Doris Epps. The important thing to remember as you

look at this diagram of Daniel Pregent's apartment is that there is a sink in that utility room, and it is not that unusual, I submit to you ladies and gentlemen of the jury, for blood to be washed down a sink.

[95] Look at the sink in Robert Fleetwood's apartment. There is a photograph of that. There seems to be blood all over the place. Why is that the case? Because of the water pressure. There is something wrong with the water pressure in Robert Fleetwood's sink. But if the water is running, it can wash the blood away. The sink was not sent to Dr. Lee for microscopic analysis to see if there was residue of bloodstains in the porcelain sink. That was not done. Blood was not visible in the sink, according to the police testimony.

There is something interesting about this testimony about blood and where it is visible and where it is not. This is a towel introduced by the State in this case. It was found in the bedroom of Daniel Pregent. There are stains on here, and these stains apparently are not blood. That sure is a stained towel though. Dr. Lee's conclusion, however, is that that is not blood in this case.

I submit to you that in this particular case it is very difficult to tell what is or what is not blood. If that is not a bloody towel, I am not sure I know what a bloody towel would look like.

Robert VanArsdall tells you he goes across the hall. Foolishly and for no reason, he picks up the knife. He says he did not want to leave it there for Danny Pregent, and he did [96] not know what Pregent would do if he had another weapon. But he takes this knife, the murder weapon. He takes it across the hall. He does not flee.

He does not run out the back door where he came in and where, apparently, no one, with the exception of Daniel Pregent, saw him there.

No, he does not do that. He goes across the hall where he knows Robert Fleetwood lives, and he knocks on the door. Jane Meiner answers when he says who is there. He says, "Bobby." She thinks it is Bobby Crain. She opens the door, and he goes inside. He tells them he has been in a fight, and he surrenders the weapon. He is not keeping the weapon from anybody. He does not resist.

The weapon is taken away from him, and he tells them that there is something wrong across the hall. He tells Mark Mood and Jane Meiner that.

I submit to you is that the action of a murderer? Is he going to take the murder weapon? What can be more incriminating than to go carrying around the bloody murder weapon, take it across the hall, tell other people what has happened, and not run away?

This murder did not happen in Bobby VanArsdall's apartment. This was a body in the kitchen of Daniel Pregent. But what are the actions of Robert VanArsdall?

[97] That is what you have to examine in this case. You are the finders of fact. You are the individuals who must determine the credibility of the witnesses in this case.

One of the things you must consider and which, I am sure, the State will emphasize in rebuttal is the statement of January 1, 1981, by Bobby VanArsdall to the police. He says many things in there which I told you, quite candidly, in the opening statement, were not true. There is some narrative in there where he goes out in the hall because he feels ill, and the next thing he knows, there is a body

in Daniel Pregent's apartment. That is not what happened, and Bobby VanArsdall told you that that is not what happened. In fact, he told the police voluntarily two days after that. Why did he make a false statement to the police? His explanation is that he was scared. He was just plain scared. He is a young man. He was twenty-two at that time. He is twenty-three now. He had witnessed a savage attack by Daniel Pregent. He is obviously confused.

Listen to the statement? He tells you at several points or he tells the police at several points that he is confused. He denies having sexual relations with Doris Epps. That is not true. He did. The reason he denies it is he told you he was afraid he was somehow going to be charged with some sort of related offense, some sort of sex offense.

[98] The boy had already been charged with murder. He told you or he told the police that he did not know who did it. Why did he say that? His explanation was he did not want to get Daniel Pregent in any more trouble than Danny was already in. He had known Daniel Pregent. He had lived with Daniel Pregent. But two days later he does tell the police what happened. He tells them that Daniel Pregent committed this offense, and he told you on the witness stand that he had nothing to do with committing the offense and that it was Daniel Pregent's act.

What he tried to do, as best he could, is somehow help the poor victim, and he ends up getting blood all over him. He foolishly takes the murder weapon across the hall. Perhaps it is not so foolish after what he has just wit-

nessed. The next thing he knows, within a matter of minutes, he is being arrested and charged with murder.

One of the things you must evaluate when you look at the testimony of these witnesses, is the memory of the witnesses. Memory is a fleeting and a transient thing. These events happened some nine months ago. Many things are easily misunderstood and unconsciously misrepresented. These New Year's Eve party goers, many of whom were intoxicated, have fading memories.

[99] Witnesses are nervous when they appear in court. There is confusion, we submit, and inconsistencies in certain of the testimony. It is your job, as the jury, to attempt to reconcile those inconsistencies.

Mr. Nicholas has told you of the very severe inconsistencies between the testimony of Timmons and Mr. Montgomery regarding the entry of Pregent's apartment and the arrest of Daniel Pregent. It has also been pointed out to you the inconsistencies or possible shaky memory of testimony between Mrs. Meiner, Robert Crain, and Robert Fleetwood. I do not think that that is of that great a significance, except to point out to you that memories do fade, that the witnesses are only human, and that they are testifying as best they can.

One matter which has been raised and which seems to be of great importance to the State is whether or not Robert VanArsdall was asked, during his second police interrogation on January 3rd, if he had sexual relations. I think the easiest way for you to clear it up is to listen to the tape. Read the transcript and see what was said.

On Page 4 of the transcript of the January 3rd statement to the police there is a question about three-quarters

of the way down. Detective Bowers says—they are talking to Robert VanArsdall—"Did they"—not, "Did you . . . ," but, [100] "Did they have sex that night?" Mr. VanArsdall replies, "I heard them move around in the bed. I figured that's what they were doing."

On Page 5 there is a question from Detective Bowers, "That didn't bother you?" VanArsdall replies, "No. I was too damn tired." Detective Bowers said, "You just laid there?" VanArsdall said, "Yeah." Bowers said, "You didn't get excited by all the activity?" VanArsdall says, "No."

We submit it is clearly plausible that Robert VanArsdall understood that he was not being questioned about his own sexual activity that evening. The first question on Page 4 was, "Did they have sex?" He said, "No." There were follow-up questions. How is he to assume that in Detective Bowers' mind that relates to his own sexual activity? He denied it the first time. He just was not asked the second time. The second time he did tell you and he did tell the police.

You heard his statement that, yes, he had possession of the weapon and, yes, he knows who committed the offense. Daniel Pregent committed this offense. What are you to think of the January 1, 1982, statement that was taken from Robert VanArsdall? We submit that you should look upon it as a confused statement by a young man in very trying circumstances. [101] It is almost the kind of thing that a little child would make up. It is not a well-concocted story by some devious mind. He just denies all kinds of things. Denies things that are easily verifiable.

"Did you have the knife?" "No, I did not have the knife." There were two obvious witnesses who saw him in possession of the knife, Mark Mood and Mrs. Meiner. They took the knife from him. He gave them the knife.

Mr. Nicholas discussed in great detail the police investigation. The only thing I would want to add is that we are not attempting to put the police on trial in this case. That is certainly not the point here. The only individual who is on trial here is Robert VanArsdall.

But the important thing to remember about the police investigation is that the police fastened on two suspects in a very short period of time. They determined they were guilty. This was a snap arrest. Less than twenty minutes. We submit to you that with the exception of wondering whether or not this guy might only be an accomplice, this case has not been thoughtfully reevaluated by the authorities any time since the arrest on January 1, 1982.

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Rebuttal Argument of Dana C. Reed,
Deputy Attorney General

Volume XI at 115-17

[115]

• • • They would pick where a witness would differ—these are the background witnesses, the witnesses at the party—from another one, and they would use that witness to show how the other one differed, and so forth, and they, in effect, were picking and choosing the parts you should believe of the witness, but then the parts that hurt them, you should not believe.

Again, it all came down to what is there a dispute about? Is there a dispute in this case as to what those witnesses basically said, and that is that Robert VanArsdall was there later in the evening and he was over at Pregent's? We know that by his own admission.

He eventually took the murder weapon over across the hallway to Fleetwood's apartment. There we have one of their shining points of defense, that is, why did Mr. VanArsdall take the knife across the hall? Why didn't he just run out? Was he acting like a murderer? How does a murderer act? In line with that, is there an average murderer?

You can see for yourself that this was a senseless murder. There was no reason for it, or no reason that anyone knows about anyway, other than Mr. VanArsdall and Mr. Pregent. No reason. A senseless crime, and senseless happenings after that crime.

[116] The sword cuts both ways. Mr. VanArsdall says today, "I was afraid. That is why I left the apart-

ment and went across the hallway. I wanted to take that knife over there to protect myself and to keep it away from Pregent, and I was trying to help that lady." Are his actions consistent with that, that is, being afraid? Why didn't he just run out the back if he was afraid?

Then he gives a lot of information out. He eventually says, "I think there is something wrong across the hall." Not, "I just have been in a fight with Daniel Pregent and he has ripped this lady up one side and down the other side. He punched me two times on the back, and we had a struggle." No. He says, "I think there is something wrong across the hall." Is that a normal response? Remember, that is the way he answered at the door.

Then, according to his theory, if the murderer is still loose across there, he goes over with Jane Meiner and comforts her and says "It's all right." The murderer is still loose in there.

You cannot explain everything. You cannot explain why he did that action any more than why Daniel Pregent just went back to bed. Is that consistent with being a murderer? He is so afraid of Pregent, and yet he goes and takes the knife, [i17] walks into the hall, and then goes back into the hall. He is just sort of meandering around. As I said, the sword cuts both ways. That is not consistent with his story.

Then they supposedly have this struggle in Pregent's apartment where he is knocked down, and so forth. This is Mr. VanArsdall. Take a look at the pictures. The defense would have you believe it is wall-to-wall blood. It is not. There is a large amount of blood in the kitchen,

you will see, where it came out of the body. There is a small trail—Detective Bowers characterized it as a narrow trail, and I think that is relatively accurate—from that into the hall and into the bedroom and living room, and that trail goes all the way to the foot of that bed where that spot is where Dr. Lee's theory is she sat down at some point, and then there is blood on the end of that bed, which you have seen, and on the floor at the foot of that bed. That is it.

Where do you see handprints? Look at VanArsdall's clothing. Where do you see him landing in blood? If there was a struggle in that room, surely at some point a hand would have come down. He would have hit it with his rear or he would have hit it somewhere in the front. The only contact pattern on his pants is on the right knee, and that is more consistent with doing some stabbing than it is falling down in a fight.

No. 84-1279 (3)

In The

Supreme Court of the United States

October Term, 1984

STATE OF DELAWARE,
Petitioner

v.

ROBERT E. VAN ARSDALL,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF FOR PETITIONER

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September 6, 1985

PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 7, 1985
CERTIORARI GRANTED JULY 2, 1985

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QUESTION PRESENTED

Under the Confrontation Clause, when a prosecution witness relates facts which the defendant has conceded, does an erroneous restriction of the defendant's cross-examination of that witness require reversal without consideration of the harmlessness of the error?[1]

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[1]The principal parties in the Delaware Supreme Court were the STATE OF DELAWARE, Petitioner, and ROBERT E. VAN ARSDALL, Respondent. Additionally, the Delaware Supreme Court permitted the GANNETT COMPANY, INC., publisher of the Wilmington, Delaware newspapers *The Morning News* and *The Evening Journal*, to intervene as a party on the issue of the trial court's refusal to grant Van Arsdall's request to close the pretrial proceedings. Because that issue was not resolved by the Delaware Supreme Court and is not presented in this case, GANNETT has not been named as a party in this Court.

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No. 84-1279

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OPINION BELOW

The opinion of the Supreme Court of Delaware (Pet. App. A-1) is officially reported at 486 A.2d 1 (Del. 1984).

JURISDICTION

The judgment of the Delaware Supreme Court, reversing respondent's first-degree murder and weapons

convictions, was entered on November 19, 1984. The petitioner's timely motion for a rehearing before the Delaware Supreme Court, sitting *en banc,* was denied December 12, 1984 (Pet. App. B-1). A petition for certiorari was filed on February 7, 1985 and granted on July 2, 1985. 105 S.Ct. 3552 (1985). The jurisdiction of this Court rests on 28 U.S.C. §1257(3). Although the judgment below vacated the convictions and remanded for a new trial, the judgment is final for purposes of review by this Court because Delaware law would preclude, in the event of an acquittal upon retrial, a subsequent prosecution appeal of the federal issue now presented. *Florida v. Meyers,* 104 S.Ct. 1852, 1853 n.* (1984) (per curiam); *California v. Stewart,* 384 U.S. 436, 497, 498 n. 71 (1966) (decided with *Miranda v. Arizona*).

CONSTITUTIONAL PROVISION INVOLVED

1. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

2. Although not directly involved in the question presented, the following provisions of the Delaware code were involved in the prosecution and are reproduced in Pet. App. at C-1. Del. Code Ann. tit. 11, §§ 271(2)(b), 636(a)(1), 1447 (1979); Del. Code Ann. tit. 21, § 4149 (1979).

STATEMENT OF THE CASE

A jury found Robert E. Van Arsdall guilty of murdering Doris Epps in the apartment of his friend, Daniel Pregent, in the early morning hours of January 1, 1982.[2] On appeal, the Delaware Supreme Court determined that the trial court had impermissibly, under the Confrontation Clause, restricted the defense cross-examination of Robert Fleetwood, a prosecution witness. Refusing to make any inquiry concerning whether Fleetwood's testimony merely echoed facts conceded by the defense, the Delaware court then reversed the conviction, holding that this type of Confrontation Clause error could never be found harmless. The question presented by this petition is whether the Confrontation Clause requires such a remedy of automatic reversal.

1. The Killing

Pregent and Fleetwood lived across the hall from each other in a small apartment house in Smyrna, Delaware.[3] On December 31, 1981, they decided to have an

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[2]Del. Code Ann. tit. 11, § 636(a)(1) (1979) [Pet. App. C-1]. Van Arsdall was also convicted of possessing a deadly weapon, a knife, during the murder. Del. Code Ann. tit. 11, § 1447 (1979) [Pet. App. C-1]. The position of the prosecution was that Van Arsdall, either singly or jointly with Pregent, killed Epps. Del. Code Ann. tit. 11, § 271(2)(b) (1979) (accomplice liability) [Pet. App. C-1].

[3]Citations to the trial transcript (Tr.) will be by volume and page number, followed by the witness' name and, where appropriate, reference to the Joint Appendix (JA). The prosecution's trial exhibits will be cited as "S.Exh." with reference to the Joint Appendix.

informal New Year's Eve party. Throughout the late morning and afternoon, people dropped in and mingled in both Fleetwood's and Pregent's apartments. In the early afternoon, Doris Epps appeared, inquiring about renting Fleetwood's soon-to-be vacated apartment. She left shortly afterwards, but returned about 4 p.m. and joined the party. About the time that the revelers were eating dinner, Van Arsdall, an acquaintance of both Pregent and Fleetwood. arrived at the party accompanied by several friends. He remained for a short time and then left. Tr. II91-94, 100-01 (Crain); III44-47 (Fleetwood) (JA76-80); IV11-12, 47-48 (Meinier) (JA122-23).

As the party progressed into the night, it lost much of its jovial nature. Pregent quarreled with one female guest and punched or kicked a hole in a wall. Tr. II95, 108-09 (Crain) (JA67-68); III62-63 (Fleetwood) (JA93-95); IV12-13, 54 (Meinier) (JA123). By 10:30 p.m., Epps had passed out, and Pregent, aided by Robert Crain, carried her into Pregent's sparsely furnished apartment, placing her on a convertible sofa-bed in the combination living room and bedroom. Tr. II111-12 (Crain) (JA70-71). Soon afterwards, Fleetwood ordered most of the people to leave. Fleetwood, Meinier, and Mark Mood, who had arrived shortly before Fleetwood ended the party, continued drinking in Fleetwood's apartment. Tr. III47-49 (Fleetwood) (JA80-82); IV13, 55-56 (Meinier) (JA124-25).

Sometime between 11:00 and 11:30 p.m., Fleetwood walked across the narrow hall and quickly looked into Pregent's apartment through the open door. In the limited portion of the bedroom he could observe, he saw Van Arsdall sitting on the corner of the sofa-bed next to Pregent's feet. Fleetwood did not talk to either man, Tr.

III52 (Fleetwood) (JA85), and no one in the apartment indicated they saw or heard him. Fleetwood then returned to his apartment. Tr. III49-52, 66-68 (Fleetwood) (JA82-85, 97-98).[4]

At 11:53 p.m., Meinier, wondering about the time, stepped across the hallway to look at Pregent's kitchen clock. The living room was dark, and Meinier, after checking the time, returned to Fleetwood's apartment. Tr. IV14, 16 (Meinier) (JA125-27). About an hour later, with Fleetwood asleep, Meinier heard a knock at Fleetwood's door. She opened the door and saw Van Arsdall, holding a bloody knife, his shirt splattered and his hands covered with blood.[5] He told her that "he had gotten in a fight" but that "I got them back." Tr. IV17-21, 61 (Meinier) (JA128-32). Told by Van Arsdall that "there's something wrong across the hall," Meinier looked into Pregent's apartment and saw Epps' body on the kitchen floor. Tr. IV22 (Meinier) (JA132).

When the police arrived several minutes later, they found Epps' disemboweled and mutilated body on Pregent's kitchen floor with the floor covered and surrounding furnishings splashed with blood and tissue. Blood

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[4]Van Arsdall had returned to Pregent's apartment about 11:30 p.m. Tr. X41 (Van Arsdall) (JA141). In the interval between leaving the party in the afternoon and returning to Pregent's, he had been drinking with various people. Tr. X34-39, 77 (Van Arsdall). He had also seen a female acquaintance and had become upset when she refused to go out with him that evening. Tr. III30-32 (Foraker); X80 (Van Arsdall).

[5]Clinging to Van Arsdall's watch was a piece of human tissue. Tr. IV92 (Fortner); VI72 (Lee). The medical examiner concluded, without contradiction, that Epps had been killed between midnight and 1:00 a.m. Tr. II66 (Tobin).

smears led from the sofa-bed to the kitchen. Tr. IV129 (Timmons).—In the darkened living room, police found Pregent wrapped in a blanket on the blood-drenched bed. Tr. IV129-30 (Timmons).

While the police continued their investigation at the apartment, Van Arsdall remarked that he "didn't think it would go like this." Tr. VII70-72, 77 (Montgomery). Later that morning, in a tape-recorded statement, Van Arsdall said he had returned to Pregent's apartment, using the back stairs, about midnight. In the kitchen, Pregent and he had talked while Van Arsdall made sandwiches. Moving into the bedroom, Pregent sat on the sofa-bed while he sat on several cushions arranged on the floor next to the bed. The two continued to talk until Pregent fell asleep. S.Exh. 73 at 11-12 (JA22-23), Tr. X12. Denying that he had engaged in sexual intercourse with Epps, Van Arsdall said he soon went out into the hall for some fresh air, noticing nothing unusual in the apartment. There he was joined by Meinier coming out of Fleetwood's apartment. S.Exh. 73, at 8, 12, 17-18 (JA18, 23, 30). She told him that she had heard a noise, and disregarding his comment that Pregent was asleep, she entered Pregent's apartment. Following her, he saw Epps' body on the kitchen floor, and as he tried to help Epps, he became covered with blood. S.Exh. 73, at 4, 8, 12-13, (JA14, 18-19, 23-24).

Two days later, Van Arsdall recanted much of his earlier statement, telling the police he had lied in order to "cover up" for Pregent. S.Exh. 74, at 1 (JA36), Tr. X12. He now said that he returned to the apartment at 11:30. Pregent lay on the sofa-bed with Eps and he laid on the cushions. S.Exh. 74 at 2, 4 (JA37,

39-40). Now, in a complete turnabout from his first narration, Van Arsdall said that after hearing noises from the bed, he was awakened by Pregent dragging Epps' body past his feet into the kitchen. As he arose to investigate, Pregent hit him. The next thing Van Arsdall saw was Pregent stabbing Epps twice and "then he started cutting on her." S.Exh. 74, at 2, 4 (JA37-38, 39-40). He said he tried to pull Pregent away, but the smaller Pregent had knocked him down. After watching Pregent finish his attack, wash himself off, and return to the bed, Van Arsdall then picked up the knife and went to Fleetwood's apartment, telling its occupants he had just been in a fight. S.Exh. 74, at 2-3 (JA37-39).[6]

2. The Trial

Van Arsdall was tried first for Epps' murder.[7] Before any evidence had been presented, defense counsel, in his opening remarks, said that Van Arsdall would take the stand and "as a witness who actually observed what occurred," tell the jury "that Daniel Pregent was the one who murdered Doris Epps." Tr. II33 (Williams) (JA62). Counsel returned to the idea that Pregent was the sole

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[6]In two statements to the police, Pregent said that he had talked with Van Arsdall in the living room and he had fallen asleep on the sofa-bed. S.Exh. 72 (JA5-9), Tr. X9; S.Exh. 75, at 2, 10 (JA43, 53), Tr. X12-13. The next thing he remembered was being awakened by the police. S.Exh. 75, at 2, 10 (JA43, 53). He recalled briefly going to Fleetwood's apartment when Van Arsdall was in his apartment, and at that time, Epps was alive. S.Exh. 75 at 4-6 (JA46-49). Not until the police took him out of his apartment did he see Epps' body. S.Exh. 75, at 2, 10 (JA43, 53). He denied having or attempting to have sexual intercourse with Epps. S.Exh. 75, at 7, 12 (JA50, 56).

[7]In his subsequent trial, Pregent was acquitted.

killer, and in doing so, admitted that Van Arsdall had been in Pregent's apartment:

> What Bobby Van Arsdall intends to prove in this case is that Danny Pregent, the other individual charged with the same offenses, killed Doris Epps with a kitchen knife. *We intend to prove that this homicide occurred in Danny Pregent's apartment, that Bobby Van Arsdall had returned to that apartment late in the evening of December 31, 1981,* and entered through a back door of the apartment unseen by anyone except Danny Pregent who admitted him, that Bobby Van Arsdall had only met Doris Epps that evening and that for some unknown reason to Bobby Van Arsdall Daniel Pregent repeatedly stabbed and cut the woman.

Tr. II40-41 (Williams) (JA64-65) (emphasis added).[8]

The prosecution's case was composed of three types of evidence. First, several of the party-goers, including Fleetwood and Meinier, and the responding officers testified about the party, the scene after the killing, and Van Arsdall's remarks at the apartment house. Secondly, without objection,[9] the post-arrest statements of Van Ars-

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[8]This concession was not an isolated remark. *See* Tr. II30 (Williams) (describing Epps, Pregent, and Van Arsdall as the only three people "who know what occurred in Daniel Pregent's apartment at the crucial time") (JA60); II38 (Williams) (arrest of Van Arsdall was case "of an innocent young man who had the misfortune to be in the wrong place at the wrong time") (JA63).

[9]Van Arsdall, prior to trial, unsuccessfully sought to suppress his first statement as being involuntary and violative of Delaware's prompt arraignment requirement. The suppression issue was not pursued on appeal. He never objected to the admissibility of his second statement. Although Pregent did not testify, Van Arsdall did not object to the admission of Pregent's statements.

dall and Pregent were played for consideration by the jury. The final portion of the prosecution's case was forensic evidence.

With both sides agreeing that Epps, Van Arsdall, and Pregent were the only people in Pregent's apartment at the time of the murder, the only unresolved question was who had killed Epps. To decipher the blood marks and stains in the apartment and on the clothing of Van Arsdall and Pregent, the prosecution relied on the evidence of a forensic expert. After examining Pregent's clothing, the expert concluded that the various items had no blood on them or that the bloodstains were caused by Pregent's contact with secondary sources of blood, e.g., blood on the floor or a bloodstain on the bed. Tr. VI60-61, 64-66, 109 (Lee).

The bloodstains on Van Arsdall's clothing, including his shoes and socks, told a different story. His shirt had bloodstains that came from a source at a 35 to 40 degree angle below the shirt. Blood had fallen onto the floor and bounced onto his shoes, and one large drop had fallen directly on one shoe, soaking through to the sock. The blood on his pants also had a bounce-back or "rebound" pattern, as well as a pattern resulting from kneeling in a large pool of blood and another stain caused by drops coming down at a 10 to 15 degree angle. Tr. VI34-35, 38, 41, 56-57, 60, 100-04 (Lee). Van Arsdall thus had been facing, in a standing position, a profusely bleeding arterial wound. The expert's conclusions effectively refuted Van Arsdall's account of the movement of Epps' body and the extent of his involvement. Based on the blood on Pregent's furniture and floors, the expert concluded that Van Arsdall initially stabbed Epps while the two of them

stood near the sofa-bed. Epps' body then fell on or was placed on the sofa-bed, and she was later dragged, by her shoulder, into the kitchen where more wounds were inflicted, resulting in a "cast-off pattern" of blood by the swinging of the knife. Tr. VI89-96 (Lee).

a. Fleetwood's Testimony

Called as a witness, Fleetwood, after relating the chronology of the party,[10] described his glimpse into Pregent's apartment near 11:30 p.m.:

> A. I just seen him on the edge of the bed and I seen his feet hanging from the bed.
>
> Q. Whose feet?
>
> A. Danny Pregent's feet hanging from the bed. I mean, that's all I could see was about from here (indicating) down.
>
> Q. What part of the bed would Pregent have been on?
>
> A. He was like on the end of the bed like thisaway (indicating), on the end of it.
>
> Q. And you said you saw who else sitting on the bed?
>
> A. Bobby Van Arsdall.
>
> Q. Did you see anyone else in the apartment at that point?
>
> A. No, I didn't.
>
> Q. Did you see Doris Epps?
>
> A. No, I didn't.

[10]Most of Fleetwood's recitation of the events occurring at the party was consistent with the testimony of Crain and Meinier. *See supra* at 3-5.

> Q. Can you say whether she was there or not?
>
> A. No.

Tr. III50 (Fleetwood) (JA82-83). He did not talk to Van Arsdall or Pregent. After returning to his apartment, he fell asleep about 30 minutes later. Tr. III53 (Fleetwood) (JA85).

Near the end of cross-examination, defense counsel sought to question Fleetwood about his arrest, six weeks prior to trial, for walking drunk on a highway[11] and the subsequent dismissal of that charge after he had indicated that he would speak to the prosecutor the next day about the Epps murder. Tr. III69 (Fleetwood) (JA100). When the prosecutor objected on relevancy grounds, Fleetwood was questioned outside the presence of the jury about the issue. While he said that he understood that the dismissal was entered after he promised to appear the next day in the prosecutor's office to discuss the Epps murder, Fleetwood consistently denied that the dismissal of the traffic charge or his subsequent meeting with the prosecutor had any effect on his testimony. He indicated that he would have assented to the interview in any event and that his trial testimony echoed what he had told the police immediately after the murder. Tr. III71-78 (Fleetwood) (JA101-07).[12]

[11]Del. Code Ann. tit. 21, § 4149 (1979) [Pet. App. at C-1]. The offense is a misdemeanor under Delaware's motor vehicle code.

[12]Van Arsdall also sought to ask Fleetwood about his involvement in the investigation of an unrelated murder (that of Anthony Blake) that had occurred in Smyrna, Delaware in August, 1982. According to defense counsel's offer of proof, the chief investigating officer in the Epps case took Fleetwood to

(Continued on next page)

The trial judge prohibited the cross-examination citing Delaware Rule of Evidence 403. The rule, like its counterpart, Federal Rule of Evidence 403, allows relevant evidence to be excluded if its probative value is outweighed by other trial concerns. Tr. II82 (JA110).

b. Van Arsdall's Testimony

Though Fleetwood (and nine others) had been subpoenaed by the defense, the only defense witness was Van Arsdall whose testimony was an amalgam of the two statements he had given to the police. After telling the jury of his actions during the day, he said that "a few minutes after 11:30," he had returned to Pregent's apartment. Tr. X41-43 (Van Arsdall) (JA141-43). Pregent opened the door, and after some time in the kitchen eating and talking, the two moved into the living room. There, with Van Arsdall sitting on the sofa-bed, they had a drink and continued to talk. Tr. X43-45 (Van Arsdall) (JA143-46). When Pregent's cat came into the room, Van Arsdall "sat on

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Blake's funeral and questioned him about Blake's murder. Counsel wanted to ask Fleetwood about any bias or interest he might have because of the Blake investigation. Tr. III83-84 (Fleetwood) (JA111-12). On voir dire, Fleetwood denied that he had been offered any deal or promise by anyone in the Blake case in exchange for his testimony at Van Arsdall's trial. Tr. III85-86 (Fleetwood) (JA113-14). The local police acted independently in their questioning of Fleetwood, and no one ever suggested that Fleetwood was suspected of actual complicity in Blake's death. (By the time of Van Arsdall's trial, both the prosecution and defense knew that another person had been charged with Blake's murder.) The Delaware court did not decide whether Van Arsdall's cross-examination of Fleetwood on this point had been impermissibly limited, noting only that "an accused [should] be given some latitude to search for agreements or understandings. . . ." Pet. App. at A-6, n. 3.

the corner of the bed, playing with it for a little while and it took off." Tr. X45-46 (Van Arsdall) (JA145-46).

Departing from his earlier statements, Van Arsdall now testified that when Pregent later left the room, Epps and he had sexual intercourse, at her invitation, on the bed. Tr. X47 (Van Arsdall) (JA147.)[13] When Pregent returned, he and Van Arsdall resumed their conversation. Van Arsdall then went back to the version of events he had recounted in his second statement to the police, this time remarking that he had stopped to put his shoes on before attempting to stop Pregent's assault. Tr. X49-56 (Van Arsdall) (JA149-56). He then described the series of events occurring after Meinier opened the door, including his arrest and statements to the police. Tr. X57-70 (Van Arsdall) (JA157-64). Throughout all of his testimony, Van Arsdall never denied being at Pregent's apartment about 11:30 p.m. or sitting on the sofa bed.

c. Summation

Though Fleetwood's evidence placed Van Arsdall at Pregent's apartment about 11:30 p.m., the prosecutor in ing his arrest and statements to the police. Tr. X57-70 (Reed) (JA173), in a closing argument that takes 28 pages of transcript. Instead, the prosecutor focused on the inconsistencies of Van Arsdall's testimony, urging that the physical evidence alone, and particularly when viewed with the aid of the forensic expert's testimony, rendered Van Arsdall's account implausible. After noting that neither

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[13]In pre-trial discovery, Van Arsdall had been furnished results of hair and fiber analysis which indicated Epps' body hairs were on his underwear.

Epps' death, Van Arsdall's presence, nor the physical evidence were in dispute, Tr. XI8-15 (Reed) (JA169-72), he told the jurors that the case could be reduced to whether they believed Van Arsdall or the physical evidence. Tr. XI16-27 (Reed) (JA173-78).

Defense counsel, paralleling his opening comments, then proceeded to tell the jury "what is not in dispute." Tr. XI32 (Nicholas) (JA180-81). Admitting that someone had intentionally killed Epps, counsel continued:

> The defense does not dispute that Robert Van Arsdall was in Daniel Pregent's apartment and he was there when the murder occurred. There is no dispute about that. We do not dispute that after Doris Epps was murdered, Mr. Van Arsdall left Daniel Pregent's apartment carrying the murder weapon. His clothing at that time was splattered with blood. You heard one of the witnesses testify that his shirt looked as though he had a nosebleed.
>
> He walked across the hall carrying the murder weapon, and he knocked on Robert Fleetwood's door. There is no dispute as to that. The State has offered evidence to prove that is so.
>
> Nor do we dispute that after he entered Fleetwood's apartment and washed his hands, he told Mrs. Jane Meinier and Mark Mood that he had been in a fight, and he told them there was something wrong next door. There is no dispute as to that. None of these facts are in dispute.

Tr. XI32-33 (Nicholas) (JA181).

Having conceded that Van Arsdall had been at Pregent's apartment at the time of the murder, counsel then reviewed the testimony of the prosecution witnesses. Though suggesting that Fleetwood's recitation of his

glimpse into the apartment suffered from inconsistencies,[14] he concluded his analysis of that testimony stating:

> Saying that you do believe this testimony of Fleetwood's, what does it prove? It proves what he [Van Arsdall] has never denied. It proves what he has already testified to in this trial. It proves that he was at Danny Pregent's apartment before Doris Epps was murdered. That is what it proves.

Tr. X42 (Nicholas) (JA188-89). Later counsel, in summarizing his client's testimony, again conceded that Van Arsdall was present, detailing that he had returned at 11:30 p.m. and, soon thereafter, had been in the bedroom, on and near the sofa-bed. Tr. XI92-96 (Williams) (JA192-96). Throughout the defense summation, the dispositive issue was not cast in terms of Van Arsdall's presence, which was all that Fleetwood had established, but instead defined as Van Arsdall's participation in the crime.

3. The Delaware Supreme Court and The Automatic Reversal Rule

Either rejecting or refusing to consider 25 other claims of error, Pet. App. at A-3, the Delaware Supreme Court overturned Van Arsdall's convictions after concluding that the limitation of the cross-examination of Fleetwood violated the Confrontation Clause since it "prevented the jury

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[14] A few minutes later counsel would use Fleetwood's recitation of Pregent's earlier outburst to support his argument that Pregent had killed alone. Tr. XI42-43 (Nicholas) (JA189). Later, the defense would concede that the inconsistencies in the testimony of the prosecution witnesses, including Fleetwood, were not of "that great a significance." Tr. XI99 (Williams) (JA198).

from considering facts from which it could have drawn inferences about [his] testimonial reliability." Pet. App. at A-5. The court then turned to the State's argument that any error was harmless beyond a reasonable doubt since Fleetwood's testimony did no more than establish what Van Arsdall had repeatedly admitted, i.e., that he was in Pregent's apartment and sat on the bed. Pet. App. at A-6. While never disputing the State's claim that Fleetwood's evidence was, in retrospect, cumulative and hence unimportant, Pet. App. at A-6, the court refused to even consider the State's argument. Instead, the court held that because under its view of the Confrontation Clause "a blanket" prohibition against exploring potential bias through cross-examination is "a per se error," Van Arsdall's convictions had to be reversed without any examination of "the actual prejudicial impact of such an error." Pet. App. A-7.[15]

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[15]Even outside the context of its "per se error" doctrine, the Delaware court displays some confusion about the appropriate federal constitutional standard for reviewing any restrictions on cross-examination. In the early part of its opinion, the court refers to the jury's exposure to facts sufficient for it to draw inferences about the witness' reliability as a criterion for determining the existence of a Confrontation Clause error. Pet. App. A-5. Then, in its standard of review, the court uses the same criterion to trigger constitutional harmless error analysis. Pet. App. A-7 (quoting *Reed v. United States*, 452 A.2d 1173, 1176-77 (D.C. App. 1982)). If some bias cross-examination has been allowed but the trial judge has excluded other bias impeachment evidence as being cumulative, the language of the opinion yields paradoxical results. If the appellate court concludes that the jury had sufficient facts to infer bias, the initial language would suggest that the trial judge committed no constitutional error. However, under the controlling later language, the court would be compelled to reverse unless the prosecutor establishes that the prohibition against further cross-examination was harmless beyond a reasonable doubt.

SUMMARY OF THE ARGUMENT

Because the trial judge erroneously limited cross-examination of a witness whose testimony was mirrored by that of the respondent, the Delaware Supreme Court's decision, without inquiry into the witness' actual effect on the outcome of the trial, requires petitioner to repeat a nine day trial in which sixteen witnesses testified and seventy-five exhibits were introduced. The Constitution does not require the draconian remedy of automatic reversal when the cross-examination of one witness is restricted, thus foreclosing questioning about the prosecutor's dismissal of a traffic charge in order to facilitate the witness' appearance at the prosecutor's office to discuss his testimony. Consideration of the harmlessness of this type of error is consistent with this Court's decisions in *Harrington v. California*, 395 U.S. 250 (1969); *Schneble v. Florida*, 405 U.S. 427 (1972); and *Brown v. United States*, 411 U.S. 223 (1973). At some point, contrary to the approach of the Delaware court, the other evidence of guilt and the likely effect of the excluded impeachment evidence must be factored into the balance between the defendant's interests in the procedural safeguards of the Sixth Amendment and the societal costs of retrial.

This Court's decision in *Davis v. Alaska*, 415 U.S. 308 (1974), does not mandate an automatic reversal rule for every limitation of cross-examination that somehow implicates the Confrontation Clause. Although a harmless error analysis, as defined by *Chapman v. California*, 386 U.S. 18 (1967), was not undertaken in *Davis*, notably the conviction was overturned only after the Court's review of the record revealed that the excluded impeaching cross-

examination had a "real possibility" of success and that the witness was "crucial." An outcome-determinative analysis has been either a component of the substantive description of the Sixth Amendment guarantees or employed under the *Chapman* harmless error test. Thus, nothing in the Confrontation Clause mandates an automatic reversal rule, and significant societal interests are served without sacrificing a defendant's interest in a fair trial when an outcome-determinative analysis is undertaken.

While the Court may wish to remand this case to the Delaware Supreme Court for consideration of the harmfulness of the error here, petitioner submits that the restriction on cross-examination of this witness did not materially affect the outcome because the witness' testimony was rendered insignificant, given defense counsel's opening argument and the respondent's own testimony.

ARGUMENT

RESPONDENT'S CONVICTIONS SHOULD NOT HAVE BEEN SET ASIDE WITHOUT INQUIRING WHETHER THE CONFRONTATION CLAUSE ERROR CONTRIBUTED TO THE VERDICT.

A. The prior decisions of this Court have rejected a remedy of automatic reversal, devoid of any inquiry into prejudicial effect, for erroneous restrictions on the cross-examination of a prosecution witness.

In the decision below, the Delaware Supreme Court held as a matter of federal constitutional law that if the

trial court forecloses a line of impeachment evidence during the cross-examination of *any* prosecution witness, it commits "per se" constitutional error mandating reversal without any examination of the actual prejudicial effect of the error on the outcome of the prescution. Pet. App. A-7.[16] It thus fashioned, and then applied to this case, a constitutional remedy of automatic reversal for any erroneous restrictions on cross-examination of any prosecution witness. That rule thus precludes any appellate inquiry whether the excluded impeachment evidence or the resulting, not fully impeached direct testimony was too insignificant, in the context of the other evidence, to have had any material bearing on the resulting verdict.

The Delaware court's analysis simply ignores the clear teachings of this Court's prior decisions rejecting a rule of automatic reversal for trial court rulings that erroneously limit or deny cross-examination of a prosecution witness. Such a rigid rule, used as in this case to reverse a conviction when the defendant effectively concedes the accuracy of the particular witness' testimony, imposes un-

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[16]Cross-examination has two main purposes: (1) to elicit additional facts that might qualify or explain the witness' direct testimony and (2) to impeach the witness' credibility by eliciting information reflecting on perception, memory, sincerity, and narration. E. Cleary, *McCormick on Evidence*, §§ 29, 33-47 (3rd ed. 1984). In turn, there are five generally recognized methods of impeachment, one of which is to demonstrate the witness' bias or interest. 3A J. Wigmore, *Evidence* § 943-69 (J. Chadbourn rev. 1970). While this case involves the exclusion of bias or interest evidence, the language of the Delaware court's opinion can be easily applied to restrictions on other areas of inquiry during cross-examination.

necessary burdens on the rational administration of a publicly respected criminal justice system while only minimally furthering the interests served by the Confrontation Clause.

Although a plurality of the Court has suggested that, as with the other provisions of the Sixth Amendment,[17] a demonstration of some degree of material prejudice arising from the absence of an opportunity to cross-examine is an element of a Confrontation Clause violation, this appeal does not require the Court to either define the elements of the violation or determine which party bears the burden of establishing the presence or absence of prejudice. *See Parker v. Randolph,* 442 U.S. 62, 72-73 (1979) (plurality opinion); *Dutton v. Evans,* 400 U.S. 74, 87-88 (1970) (plurality opinion). Even on the most defense-oriented standard, i.e., that the restriction on cross-examination was a constitutional error and the prosecution bears the burden to show that the error did not reasonably contribute to the verdict, the judgment of the court below must be reversed.

1. **Chapman v. California**

In *Chapman v. California,* 386 U.S. 18 (1967), this Court rejected the argument that the "denial of a federal

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[17]In other Sixth Amendment contexts, the Court has inquired, as an element of the violation, into the effect of the alleged defect on the result of the trial. *See Strickland v. Washington,* 104 S.Ct. 2052, 2067-69 (1984) (assistance of counsel); *United States v. Cronic,* 104 S.Ct. 2039, 2046 (1984) (assistance of counsel); *United States v. Valenzuela-Bernal,* 458 U.S. 858, 867-71, 873 (1982) (compulsory process); *Barker v. Wingo,* 407 U.S. 514, 532 (1972) (speedy trial); *Washington v. Texas,* 388 U.S. 14, 16 (1967) (compulsory process).

constitutional right, no matter how unimportant, should automatically result in reversal of a conviction" so that "all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful." *Id.* at 20, 21. While noting that in prior cases a rule of automatic reversal had been applied when a constitutional right basic to a fair trial had been infringed, *id.* at 23 & n. 8,[18] *Chapman* emphasized that nothing in the federal constitutional structure requires appellate courts to ignore the "very useful purpose" served by the harmless error doctrine when they fashion remedies for constitutional errors occurring during trial. An otherwise valid conviction need not be overturned unless the appellate court concluded "'there is a reasonable possibility that the [error] complained of might have contributed to the conviction.'" *Id.* at 24 (quoting *Fahy v. Connecticut,* 375 U.S. 85, 86-87 (1963)). Thus, if in the setting of a particular case, a trial error is so unimportant and insignificant, with so little, if any, likelihood of having changed the result of the trial, it may, consistent with the federal Constitution, be deemed harmless. *Chapman,* 386 U.S. at 22.

Through its application of the harmless error doctrine to constitutional violations, *Chapman* commands the appellate courts to remain steadfast in their duty to protect the constitutional rights of the accused, but not to turn a criminal appeal "into a quest for error" by "extract[ing]

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[18]The majority did not elaborate which guarantees fall within that description except to note several precedents and identify the "right" infringed. Commentators have noted that no single theory for defining which "rights" fall within that category has emerged in any of the Court's subsequent decisions. *See generally* 3 W. LaFave & J. Israel, *Criminal Procedure* ¶ 26.6(d) (1984).

from episodes in isolation abstract questions of evidence and procedure." *Johnson v. United States,* 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring). Instead, a reviewing court has a duty "to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." *United States v. Hasting,* 461 U.S. 499, 509 (1983). The procedural safeguards of the Fifth and Sixth Amendments do not guarantee the defendant a trial free of all possible error but only a trial free of harmful error. *Id.* at 508-09. *See also Bruton v. United States,* 391 U.S. 123, 135 (1968) ("'A defendant is entitled to a fair trial but not a perfect one'") (quoting *Lutwak v. United States,* 344 U.S. 604, 619 (1953)). Similarly, the defendant has no automatic right to an appellate remedy for trial errors fashioned without consideration of the countervailing societal interests. Reversal for errors that were harmless denigrates the state's legitimate desire to avoid costly retrials; threatens to cause criminal litigation to become interminable; and diminishes the public's respect for both the constitutional protections and the criminal justice system generally. *See Rushen v. Spain,* 104 S.Ct. 453, 455-56 (1983) (per curiam); *Hasting,* 461 U.S. at 509; *Snyder v. Massachusetts,* 291 U.S. 97, 122 (1934) ("There is danger that the criminal law be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction. . . .") (Cardozo, J.).[19] *See also United States v. Bagley,* 105 S.Ct. 3375, 3395 (1985) (Marshall, J., dissenting).

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[19]As Justice Traynor observed:

> Like all too easy affirmance, all too ready reversal is also inimical to the judicial process. Again, nothing

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2. Pre-Davis Decisions

Sixty-nine years before *Chapman,* during the era of automatic reversal for constitutional violations,[20] this Court, in *Motes v. United States,* 178 U.S. 458 (1900), ruled that the Confrontation Clause had been violated when a highly incriminatory, pre-trial statement made by an escaped co-conspirator had been admitted at trial. Although as a result of the error, the jury had heard the "testimony" of a witness totally immune from trial cross-examination, this Court refused to blindly apply a rule of automatic reversal that would result in a new trial for one of the several defendants. That defendant had taken the stand and, reciting facts consistent with those related by the absent witness, admitted his participation in the crime. Holding that "[i]t would be trifling with the administration of the criminal law," *id.* at 476, to reverse for such a trial error when the defendant had by his own testimony affirmed the reliability of the missing witness, this Court ruled the Confrontation Clause violation harmless.[21]

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> is gained from such an extreme, and much is lost. Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.

R. Traynor, *The Riddle of Harmless Error* 50 (1970).

[20]See Saltzburg, *The Harm of Harmless Error,* 59 Va. L. Rev. 988, 999-1002 (1973).

[21]In the ensuing years, this Court would apply the harmless error doctrine to affirm a conviction where a hearsay statement of a declarant not presented for cross-examination had been erroneously admitted. *Lutwak v. United States,* 344 U.S. 604,

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Two years after *Chapman,* the argument that Confrontation Clause errors fell within the category, suggested in *Chapman,* 386 U.S. at 23, of generically harmful violations which require reversal without regard to the facts or circumstances of the particular case was rejected in *Harrington v. California,* 395 U.S. 250 (1969).[22] In *Harrington,* the jury heard, in violation of the Confrontation Clause,[23] the pre-trial statements of two co-defendants who did not testify. The statements implicated Harrington by placing him at the scene of the robbery. However, the Court affirmed Harrington's conviction, refusing to adopt for such errors involving a denial of the opportunity for cross-examination "the minority view in *Chapman* that a departure from constitutional procedures should result in an automatic reversal, regardless of the weight of the evi-

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619 (1953). Even where it ultimately reversed convictions where trial rulings had erroneously precluded cross-examination, the Court did so only after determining that the error had a material effect on the outcome. *Gordon v. United States,* 344 U.S. 414, 422-23 (1953) (direct restriction on admission of impeaching prior inconsistent statement); *Krulewitch v. United States,* 336 U.S. 440, 444-45 (1949) (erroneous admission of hearsay).

[22]Harrington had specifically and extensively argued that a rule of automatic reversal was required because the Confrontation Clause's guarantee of cross-examination was a right basic to a fair trial. Brief of Petitioner at 12-40, No. 750, O.T. 1968. To support his assertion, he cited the language in *Brookhart v. Janis,* 384 U.S. 1, 3 (1966) that the denial of cross-examination was "constitutional error of the first magnitude" which "no amount of showing of want of prejudice would cure." *Harrington* rejected a rule of automatic reversal even though the Court had recently concluded that the *Bruton* rule was to be applied retroactively because the restriction on cross-examination was a "serious flaw" that "went to the basis of [a] fair hearing and trial." *Roberts v. Russell,* 392 U.S. 293, 294 (1968) (per curiam).

[23]*Bruton v. United States,* 391 U.S. 123, 127-28 (1968).

dence." 395 U.S. at 254 (citation omitted). Instead, after undertaking its own review of the record to ascertain "the probable impact of the two [uncross-examined statements] on the minds of an average jury," *id.,* this Court concluded that the error could not have contributed to the verdict, because the co-defendants' statements merely echoed what Harrington had admitted in his own pre-trial statement which had, without objection, also been presented to the jury.[24]

After *Harrington,* an automatic reversal rule for Confrontation Clause errors has continued to be rejected. The admission of a co-defendant's statements, in violation of *Bruton,* has been held harmless where after reviewing the entire record, the Court concluded that the "inadmissible statements . . . at most tended to corroborate certain details of [the] petitioner's comprehensive confession" which the jury had necessarily credited. *Schneble v. Florida,* 405 U.S. 427, 431 (1972). Similarly, the admission of a co-defendant's statement, misperceived by the trial judge as falling within the co-conspirator hearsay exception, while conceded to be a violation of the Confrontation Clause, has been found harmless where "[t]he testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury," including the defendant's own confes-

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[24]Indeed, the dissenters rejected a rule of automatic reversal for Confrontation Clause errors, emphasizing that "[t]he focus of appellate inquiry should be on the character and quality of the tainted [uncross-examined] evidence *as it relates* to the untainted evidence and not just on the amount of untainted evidence." *Harrington,* 395 U.S. at 256 (Brennan, J., dissenting) (emphasis added).

sion. *Brown v. United States,* 411 U.S. 223, 231 (1973). *Accord Parker v. Randolph,* 442 U.S. 62, 77, 80-81 (1979) (Blackmun, J., concurring) (admission of incriminating statements of co-defendants, not subject to cross-examination, harmless where each defendant confessed); *Dutton v. Evans,* 400 U.S. 74, 91-93 (1970) (Blackmun, J., concurring) (admission of a hearsay statement, while violative of Confrontation Clause, harmless because not prejudicial).

The Delaware court offered no explanation of why it felt that the *Chapman* harmless error standard, adopted in *Harrington,* was not controlling. It is difficult to find any distinctions which would justify a differing rule. The error is the same: the presentation of testimony without the opportunity for full cross-examination.

The court below could not reject *Harrington* simply on the basis of a perceived distinction of how the witness was rendered unavailable for full cross-examination. Analytically, the trial judge in this case underestimated the probative value of the proffered impeachment evidence or overestimated the interests in the trial proceeding expeditiously and accordingly sustained the prosecutor's objection to a requested line of defense cross-examination. Yet, in doing so, he had no greater culpability than those trial judges who overvalued the administrative convenience of joint trials and refused to grant the defendant's request for a severance as in *Harrington,* granted the prosecution's motion for joinder as in *Schneble,* or misconstrued the limits of the federal co-conspirator hearsay exception as in *Brown.*[25]

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[25]The Delaware approach also finds no support in the assumption that in a *Harrington* situation, a jury will readily see

(Continued on next page)

One need do no more than juxtapose the circumstances in *Harrington* to those here to see that the Delaware court's automatic reversal rule is wrong. In *Harrington,* a harmless error analysis was permissible even though (1) the jury had no opportunity to observe the demeanor of the declarant while he gave his narrative; (2) the statement was not made under oath in the courtroom; (3) the defendant had no opportunity to pursue any line of cross-examination; and (4) no record existed of the questions sought to be posed and the declarant's answers. Surely the same analysis can be undertaken where, as here, (1) the jury could observe the witness' demeanor during his recitation; (2) the witness testified under oath; (3) the defendant pursued other lines of impeachment cross-examination; and (4) a record exists of the precluded questions and the witness' responses.

3. Davis v. Alaska

The decision in *Davis v. Alaska,* 415 U.S. 308 (1974), purportedly relied upon by the court below, did not overturn *Harrington* to create a rule of automatic reversal for violations of the right of cross-examination encompassed

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(Continued from previous page)

the co-defendant's bias and interest, and hence the unreliability of his statement, while in the direct restriction situation, the jury may, without the restricted cross-examination, have no reason to suspect the bias or interest of the "normal" witness. That assumption of the jury's perception of bias of the co-defendant was rejected in *Bruton,* 391 U.S. at 136 n. 12; *id.* at 137-38 (Stewart, J., concurring). Indeed, if it could be assumed that the jury has such an ability to "discern" the bias or interest and hence to "see" the unreliability, the rule of *Bruton* is unnecessary. Secondly, a distinction cannot be drawn that in the *Harrington* situation the co-defendant may attack the veracity of his own statement. The co-defendant may continue to have an interest to focus his in-court attack on only the portions damaging to him, leaving intact those incriminatory of his accomplice.

by the Confrontation Clause. In *Davis,* this Court reversed a conviction because the defendant was prohibited from using in his cross-examination of one Green, the fact that Green was on probation as a juvenile delinquent at the time of his pre-trial identifications of the defendant. The Court concluded, on the basis of the facts presented, the defendant had been "denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' " *Id.* at 318 (quoting *Brookhart v. Janis,* 384 U.S. 1, 3 (1966)).[26] But this finding came only after the Court, on its own review of the record, had concluded: 1) that Green "was a crucial witness for the prosecution," 415 U.S. at 310, whose testimony "provided 'a crucial link in the proof . . . of petitioner's act,' " 415 U.S. at 317 (quoting *Douglas v. Alabama,* 380 U.S. 415, 419 (1965)), so that "[t]he accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner," 415 U.S. at 317; and 2) that there was a "real possibility" that pursuit of the excluded line of impeachment evidence would have done "[s]erious damage to the strength of the State's case." 415 U.S. at 319. That language indicates that *Davis* did not hold that all lines of cross-examination of all witnesses were equally protected by the Confrontation Clause so that reversal is required if the cross-examination of any witness has in some way been impaired. Instead, *Davis,* by defining the error as the denial of the right of *effective* cross-examination, speaks in terms of reversal only for material er-

[26]The *Brookhart* language originated as a concession made in a party's brief.

rors.[27] Constitutional error of the first magnitude occurs when relevant cross-examination of a key witness has been restricted to the point that the defendant's ability to show unreliability has been rendered "ineffective."[28]

Instead of a rule of automatic reversal, *Davis* suggests the appropriate two-level focus to review erroneous restrictions on cross-examination. In order to reverse, an appellate court must first find, in the context of all the evidence, that there is a substantial reason to believe that the excluded impeachment evidence would have affected the jury's judgment of the witness' credibility, i.e., that it would have weakened the impact of the witness' testimony. If so, the court must then find that the not fully impeached, and hence tainted, direct testimony was of such significance that there was a reasonable possibility the defendant would not have been convicted without it.[29] Unless the ap-

[27]Thus, in speaking the right to the *effective* assistance of counsel under a companion clause of the Sixth Amendment, this Court has emphasized that "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *United States v. Cronic,* 104 S.Ct. 2039, 2046 (1984).

[28]Because in *Davis,* the defendant's guilt or innocence hinged almost exclusively on the fact-finder's evaluation of Green's testimony, and the excluded evidence was so damaging, the Court could easily equate the restriction to a denial of all cross-examination, as in *Brookhart.*

[29]*See* Note, *Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of* Davis v. Alaska, 73 Mich. L. Rev. 1465, 1472-73 (1975). The above criteria dovetail with the conclusion of harmless error in *Harrington.* When the error precludes cross-examination entirely, with no record of the questions to be answered, the first prong must by necessity be answered in the negative. Thus, the reviewing court must determine whether, as in *Harrington,* the unimpeached testimony contributed to the verdict.

pellate court, upon review of the entire record, can make both of these findings,[30] "it cannot be said that the conviction . . . resulted from the breakdown in the adversary system that renders the result unreliable," and hence constitutionally deficient. *Strickland v. Washington*, 104 S.Ct. 2052, 2064 (1984).[31]

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[30]The reviewing court must also consider whether a countervailing state interest overrode the defendant's right to cross-examination in the particular case. No decision by this Court suggests that all testimonial privileges (e.g., attorney-client privilege), the government's several privileges to prevent disclosure of certain types of information (e.g., identity of informants), or evidentiary rules of relevance (e.g., Rule 403 of the Federal and Delaware Rules of Evidence) can never create a constitutionally appropriate restriction on cross-examination. *Cf. Davis*, 415 U. S. at 321 (Stewart, J., concurring) (no federal right created in all cases to impeach general credibility of witnesses through cross-examination about past convictions or delinquency adjudications).

[31]The majority of the lower courts have accepted this reading of *Davis* rather than a rule of automatic reversal for any restriction. Thus, they have found restrictions on cross-examination errors harmless where there was little likelihood that the excluded evidence would have altered the fact-finder's assessment of credibility. *See, e.g., United States v. Gambler*, 662 F.2d 834, 840-42 (D.C. Cir. 1981); *Kines v. Butterworth*, 669 F.2d 6, 11-13 (1st Cir. 1981), *cert. denied*, 456 U.S. 980 (1982); *United States v. Garza*, 754 F.2d 1202, 1206, 1208 (5th Cir. 1985); *Carrillo v. Perkins*, 723 F.2d 1165, 1172-73 (5th Cir. 1984); *United States ex rel. Scarpelli v. George*, 687 F.2d 1012, 1013-14 (7th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *Ransey v. State*, — Nev. —, 680 P.2d 596, 597-98 (1984) (per curiam); *State v. Pierce*, 64 Ohio St.2d 281, 290, 414 N.E.2d 1038, 1043-44 (1980) (per curiam); *State v. Patterson*, 656 P.2d 438, 439 (Utah 1982). Other courts have held restrictions on impeachment cross-examinations harmless where the error involved a "merely buttressing prosecution witness," *United States v. Duhart*, 511 F.2d 7, 9 (6th Cir.), *cert. dismissed*, 421 U.S. 1006 (1975); *see also United States v. Smith*, 748 F.2d 1091, 1096 (6th Cir. 1984), or where the witness gave testimony consistent with the defendant's own recitation. *Snyder v. Coiner*, 510 F.2d 224, 227-28 (4th Cir. 1975).

Davis followed a long line of opinions of this Court which have reversed convictions for Confrontation Clause violations not where "the prejudice in the denial of the right of cross-examination constituted a mere minor lapse," *Douglas*, 380 U.S. at 420, but only where the defendant had been denied effective cross-examination of a key prosecution witness who gave crucial testimony. *See, e.g., Smith v. Illinois*, 390 U.S. 129, 131 (1968) (trial court "emasculated" cross-examination by precluding rudimentary inquiry on cross-examination concerning the real name and address of the "principal witness" who was the only prosecution witness to testify to the "crucial events" and did so in a manner entirely different from the defendant); *Alford v. United States*, 282 U.S. 687, 688-89 (1931) (trial court precluded inquiry aimed at showing informant status of witness who gave uncorroborated "damaging testimony" including contents of conversations with defendant when others were not present). *See also Douglas*, 380 U.S. at 419 (defendant denied cross-examination where prosecutor read accomplice's statement which provided "crucial link" in proof and only "direct evidence" of defendant's acts and his intent); *Pointer v. Texas*, 380 U.S. 400, 410 (1965) (admission of preliminary hearing testimony of robbery victim precluded cross-examination of "chief" prosecution witness); *Barber v. Page*, 390 U.S. 719, 720 (1968) (admission of preliminary hearing testimony of accomplice precluded cross-examination of "principal evidence" incriminating defendant); *Bruton*, 391 U.S. at 127-28 (co-defendant's statement "added substantial, perhaps even critical weight" to prosecution's case).

The court below is unclear on the question of whether the evidence of the dismissal of the traffic charge would have affected the jury's assessment of Fleetwood's cred-

ibility. Although it speaks in such terms when defining the substantive violation, the court's finding about the excluded impeachment evidence in this case focuses exclusively on the nature of that evidence and discusses in the abstract whether the evidence was relevant. The Delaware court though quite clearly refused to make *any* inquiry whether, even under the most stringent degree of possibility, Fleetwood's testimony played a part in the resulting conviction. That decision was clearly erroneous.

4. Giglio v. United States

Respondent may urge that the Constitution commands the automatic reversal rule because it is unfair for the prosecutor to exercise his exclusive prerogative and dismiss charges in return for a witness' appearance at his office for pre-trial preparation and then prevent the defendant from placing that conduct before the jury. If that is the premise underlying the judgment below, it too is inconsistent with the prior opinions of this Court. Initially, the argument, focusing on the culpability of the prosecutor rather than the fairness and reliability of the trial, overlooks the fact that the exclusion of the impeachment evidence offered by the defense is not a unilateral decision of the prosecutor. A restriction on defense cross-examination is ultimately a decision of the trial judge. The prosecutor can only lodge his objection. Unless this Court views all trial judges as instruments of the prosecution bent on subverting the defendant's ability to present a defense, the rule of automatic reversal is an unneeded medicament.

Secondly, even assuming that the trial judge and prosecution should be viewed as partners, and further assuming that the prohibition on the defense exposure of the

witness' cooperation with the prosecutor is conduct similar to an affirmative misrepresentation to the jury of a lack of any testimonial motivation, a remedy of automatic reversal is not constitutionally compelled. Indeed, even where the prosecutor affirmatively misrepresents to the jury that the government had made no prosecutorial concessions for a witness' testimony, this Court has refused to find that a new trial is necessarily required. Rather a conviction is vulnerable only if the inaccurate picture of credibility "'could . . . in any reasonable likelihood have affected the judgment of the jury.'" *Giglio v. United States,* 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois,* 360 U.S. 264, 271 (1959)). *See also United States v. Bagley,* 105 S.Ct. 3375, 3381-82 (1985); *United States v. Agurs,* 427 U.S. 97, 103 (1976). If, in the context of the entire record, a possibly inaccurate portrayal of the witness' credibility was not materially harmful, the prosecutor's conduct in creating the relationship and then lodging an objection does not in itself require a new trial.

B. A rule of automatic reversal is particularly inappropriate where the respondent conceded the facts related by the not fully impeached witness.

As the above litany demonstrates, the prior decisions of this Court have repeatedly rejected the position of the court below, i.e., that Confrontation Clause errors are the type of error that can never be found harmless. Yet, even if the Delaware court fashioned its rule of automatic reversal out of a concern that the Confrontation Clause precluded it from usurping the jury's function of assessing the effect of any piece of evidence on a witness' credibility, it clearly erred when it rigidly applied that rule to this

situation where the witness' testimony was "cumulative" of facts which Van Arsdall had conceded in both his testimony and argument during the trial.[32]

To apply a rule of automatic reversal in the "cumulative evidence" situation is to lose sight of the underlying purpose of the Confrontation Clause. The right of confrontation, like the other procedural commands in the Sixth Amendment, is a safeguard to ensure both the fairness and accuracy of criminal trials. *Ohio v. Roberts,* 448 U.S. 56, 65 (1980); *Dutton v. Evans,* 400 U.S. 74, 89 (1970) (plurality opinion). Neither of these goals is compromised when an appellate court determines that a restriction on cross-examination was harmless because the not fully impeached witness merely related facts independently conceded by the accused. In that situation, the accused has not been deprived of the ingredients necessary for an accurate decision by the trier of fact. While he may have been denied the ability to test the witness' reliability by cross-examination, by his own testimony, he has "afford[ed] the trier of fact a satisfactory basis for evaluating the truth of the [witness'] statement." *California v. Green,* 399 U.S. 149, 161 (1970).[33] Having himself conceded the facts related by the witness, the utility of cross-examination to make the witness a liar is minimal. *Parker v. Randolph,* 442

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[32]The congruence of the testimony is detailed at pages 7-15 of this brief. *See also* App. 1-2.

[33]Similarly, an erroneous presumptive jury instruction, which generally undermines the jury's exclusive province to determine the relationship between facts, may be found harmless where the defendant has conceded the existence of the element to which it relates. *Connecticut v. Johnson,* 460 U.S. 73, 87 (1983) (plurality opinion). *Cf. Hopper v. Evans,* 456 U.S. 605, 612-14 (1982) (omission of instruction on lesser offense, usually necessary for fair trial in capital case, harmless where defendant by own testimony negated consideration of lesser offense).

U.S. 62, 73 (1979) (plurality opinion) ("Successfully impeaching a [witness' testimony] on cross-examination would likely yield small advantage to the defendant whose own admission [of the same facts] stands before the jury unchallenged.")

Secondly, an appellate court's finding that the restriction on cross-examination was harmless in this "cumulative" situation does not usurp the jury's role of determining the credibility of any particular witness or the ultimate determination of guilt or innocence. Because the focus of the inquiry in the "cumulative evidence" situation is on the effect of the witness' direct testimony as it dovetails with indisputable evidence, the appellate court is not called upon to assess the damaging impeaching effect of any piece of evidence. Nor, in that situation, is the appellate court called upon to weigh all the evidence to conclude that any jury would have reasonably reached the same conclusion of guilt even in the absence of the error. Instead, a finding of harmlessness is simply an articulation of the common sense conclusion that when the accused conceded the accuracy of the witness' narration, the credibility or unreliability of the witness was not a determinative issue in the deliberations of the jury which convicted the accused.[34]

C. The restriction on Fleetwood's cross-examination and the resulting, not fully impeached testimony did not contribute to the jury's guilty verdicts.

This Court, if it agrees with the petitioner that the lower court's remedy of automatic reversal is erroneous, may prefer to remand to the state courts for the ultimate determination of the harmlessness of the cross-examination

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[34]*See generally* Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale,* 125 U. Pa. L. Rev. 15, 37-61 (1976).

error. However, any review of the evidence will show that there is no reasonable possibility that the cross-examination error, as it may have tainted Fleetwood's direct testimony, contributed to the jury's verdict of guilt.[35]

As the Statement of the Case outlines, *supra* at 4-8, 12-15, and as the jury was told by defense counsel, the crucial issue in the prosecution was not whether Van Arsdall was present in Pregent's apartment when Doris Epps was killed but whether he participated in the homicide. Fleetwood's testimony relating his momentary glimpse of Van Arsdall in the bedroom at 11:30 p.m., at least one-half hour before the killing, simply did not speak to that determinative issue.

Prior to Fleetwood's appearance on the witness stand, defense counsel in his opening statement told the jury that Van Arsdall had returned to the apartment at 11:30 and had remained there until he carried the bloody knife into Fleetwood's apartment near 1:00 a.m. See Statement of the Case, *supra* at 7-8.[36] Before any witness had spoken, Van Arsdall had removed from dispute the issue of his

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[35]Because it is so clear that Fleetwood's testimony did not significantly contribute to the verdict, this Court need not decide whether the excluded impeachment evidence, the prior dismissal of a traffic charge, would have reasonably affected, in the context of the entire case, the jury's appraisal of Fleetwood's credibility.

[36]Counsel's comments to the jury conceding that Van Arsdall had returned to the apartment and was present during the murder were judicial admissions of fact conclusive in the case. E. Cleary, *McCormick on Evidence* § 267, at 791 (3d ed. 1984). *See also Chiarella v. United States*, 445 U.S. 222, 244-45 (1980) (Burger, C.J., dissenting).

presence in Pregent's apartment.[37] Thus when Fleetwood took the stand, his testimony that he had caught a glimpse of Van Arsdall in Pregent's apartment, see Statement of the Case, *supra* at 10-11, did not burst as a bombshell over the jury. Instead, it merely echoed defense counsel's own statements in opening argument. Moreover, as the trial developed, with the introduction of Van Arsdall's two pretrial statements and his promised trial testimony, Fleetwood's testimony vanished into insignificance. As outlined in the Appendix to this Brief, *infra* at App. 1-2, by the close of the evidence, the jury had heard from Van Arsdall almost every factual detail related by Fleetwood.[38]

By the time of summations, the crucial issue had not changed. Respondent's presence in the apartment re-

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[37]Because defense counsel's comments, conceding Van Arsdall's return at 11:30 p.m. and promising that Van Arsdall would testify, preceded any testimony, neither those remarks nor Van Arsdall's subsequent testimony were impelled by the Confrontation Clause error. *Cf. Harrison v. United States*, 392 U.S. 219 (1968) (subsequent trial testimony induced by prior constitutional error). Obviously, Van Arsdall's two pre-trial statements, in which he said he had returned before midnight, were not "fruits" of the subsequent trial error.

[38]The jury, without objection from Van Arsdall, had also heard Pregent's two statements. While Pregent did not say that Van Arsdall killed Epps, he did say that Van Arsdall had returned, in the late evening, to his apartment sometime after Epps had been placed on the bed. S.Exh. 72, at 2 (JA6-7), Tr. X9; S.Ex. 75, at 4 (JA45-46), Tr. X12-13. Moreover, Pregent said that he had gone across the hallway momentarily, leaving Van Arsdall and Epps in the apartment. When he returned, he laid on the bed, and Van Arsdall sat on some cushions adjacent to the bed. The two talked until Pregent went to sleep. S.Exh. 75, at 4-5 (JA45-49). He denied hearing or observing anything until he was awakened by the police. Pregent's statements dovetailed with Fleetwood's recitations and, in their description of the activities in the apartment near midnight, they traced Van Arsdall's recitations.

mained conceded. See Statement of Case, *supra* at 13-15.[39] Rather, as defense counsel emphasized to the jury, "the only issue that is in dispute at this trial is whether Robert Van Arsdall is responsible for the death of Doris Epps. That is the only thing that is in dispute. It is what you must decide." Tr. XI33 (Nicholas) (JA181).

When the jurors retired to deliberate, they had indeed heard Fleetwood testify that he had seen Van Arsdall in Pregent's apartment near 11:30 p.m. Admittedly they had not heard that the prosecution had dismissed a traffic violation brought against him after he agreed to come to the prosecutor's office to discuss the Epps murder. Yet, they had heard respondent say three times, in two pre-trial statements and from the witness stand, that he had returned near 11:30 p.m. They had also heard him say that soon after he had arrived, he sat on or near the sofa-bed, sharing a drink with Pregent and playing with his cat. They had heard defense counsel, before and after the evidence, emphatically state that Van Arsdall's presence in Pregent's apartment was not in dispute. Under these facts and circumstances, where Van Arsdall conceded all the facts related by Fleetwood in his not fully impeached testimony, this Court can without hesitation say that the tainted evidence "[did not] constitut[e] a substantial part of the prosecution's case," and thus could not "have played a substantial part in the jury's delibera-

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[39]In summation, defense counsel even said that his client had sat on the corner of the sofa-bed soon after he returned. Tr. XI92 (Williams) (JA193). The prosecution, in summation, only referred to Fleetwood's testimony in a single paragraph and never suggested that it showed anything except that Van Arsdall was in the bedroom near 11:30 p.m. Tr. XI16 (Reed) (JA173).

tion and thus contributed to the actual verdict reached . . . ." *People v. Ross,* 67 Cal. 2d 64, 84, 429 P.2d 606, 621 (1967) (Traynor, C.J., dissenting), *rev'd sub. nom. Ross v. California,* 391 U.S. 407 (1968) (per curriam). It requires nothing more than common sense to conclude that the cross-examination error did not contribute to the guilty verdicts.

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CONCLUSION

The judgment of the Delaware Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX

COMPARISON OF TESTIMONY OF ROBERT FLEETWOOD AND ROBERT VAN ARSDALL CONCERNING VAN ARSDALL'S PRESENCE AFTER 11:00 P.M.

Fleetwood

a) Between 11:00 and 11:30 p.m., he walked across the hallway to Pregent's apartment. Sticking his head into the open doorway, he saw Van Arsdall sitting on the sofa-bed with Pregent's feet next to him. Tr. III49-50 (direct), 66-68 (cross) (JA82-83, 97-98).

b) He did not see the entire sofa-bed; he did not see Epps; and he did not talk to either Pregent or Van Arsdall. Tr. III52 (direct), 67-69 (cross) (JA84-85, 97-100).

c) After returning to his apartment, he "passed out" at 12:05 a.m. He awoke after the murder when the police were in his apartment. Tr. III53-54 (direct), 88-90 (cross) (JA 85-86, 115-117).

Van Arsdall

First Statement (S.Exh. 73)

a) He returned to Pregent's apartment near midnight, with Pregent opening the back door. On a sofa-bed was a woman. After Pregent and he talked for a time in the kitchen, they went into the bedroom. There, Pregent sat on the sofa-bed and he sat on cushions next to it. They talked until Pregent fell asleep. 1-3, 11-12, 17 (JA11-13, 22-23, 30).

b) With Pregent asleep on the bed, he went into the hallway for some air and encountered Meinier. He saw Epps' body when he went to return to Pregent's apartment. 12-13, 17-19 (JA11, 23-24, 30-32).

c) When he then went into Fleetwood's apartment, he saw Fleetwood asleep on the couch. 13-14 (JA 24-25).

Second Statement (S.Exh. 74)

a) He arrived at Pregent's apartment at 11:30 p.m. 1 (JA37).

b) Pregent told him to lay on the cushions next to the sofa-bed. Pregent lay on the sofa-bed next to Epps. 2 (JA37).

c) He was awakened and observed Pregent attacking Epps. 2-4 (JA 37-40).

Trial Testimony

a) At 11:30 p.m., he returned to Pregent's apartment. Tr. X41-42 (JA141-42).

b) He made some sandwiches, and Pregent and he talked for a while in the kitchen. They then went into the bedroom where he saw someone on the sofa-bed. He sat on the sofa-bed, had a drink with Pregent, and while sitting on the corner of the bed, played with a cat. Tr. X43-46 (JA143-46).

c) He then sat on the cushions next to the sofa-bed and talked to Pregent for awhile. Tr. X46 (JA 146-47).

d) After Pregent left the room for a few minutes, he had sexual intercourse with Epps. When Pregent returned, he sat on the cushions and again talked to Pregent. With Pregent on the bed, he went to sleep on the cushions. Tr. X46-49 (JA147-49).

e) He was subsequently awakened and saw Pregent enter the kitchen. After again falling asleep, he was re-awakened by Pregent attacking Epps. Tr. X49-56 (JA149-55).

f) After the attack he carried the knife into Fleetwood's apartment, told Meinier he had gotten into a fight, and that something was wrong across the hall. Fleetwood was asleep on the couch and could not be awakened. Tr. X57-62 (JA157-62).

No. 84-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF DELAWARE,

Petitioner,

v.

ROBERT E. VAN ARSDALL,

Respondent.

On Writ Of Certiorari
To The Supreme Court of Delaware

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. Is the Supreme Court of Delaware required under the Confrontation Clause to apply a harmless error rule to a total prohibition in limine of relevant bias cross-examination of a prosecution witness?

II. May the Supreme Court of Delaware as a matter of State law afford greater protections to its citizens who are erroneously deprived of the right of relevant bias cross-examination of a prosecution witness than required by federal law?

III. Is a criminal defendant, as contended by amicus curiae, required to demonstrate that an erroneous restriction of relevant bias cross-examination of a prosecution witness actually and materially prejudiced his defense?

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JURSIDICTION

The Supreme Court of Delaware is not required under the Confrontation Clause of the Sixth Amendment to the United States Constitution to apply a harmless error rule to a total prohibition in limine of relevant bias cross-examination of a prosecution witness.[1] In the alternative only, Respondent Robert E. Van Arsdall[2] also asserts that there is no federal jurisdictional basis to review the November 19, 1984, decision of the Delaware Supreme Court[3] on certiorari and this writ of certiorari should be dismissed as improvidently granted. That is, if the Supreme Court of Delaware determines as a matter of State law to afford greater rights to its citizens who are attempting to pursue relevant bias cross-examination of a prosecution witness at a criminal trial than required by federal law, such state action is not Constitutionally impermissible.[4]

CONSTITUTIONAL PROVISIONS

The Delaware Constitution of 1897, Article I, § 7 states in part:

> In all criminal prosecutions, the accused hath a right . . . to meet the witnesses in their examination face to face. . . .

STATEMENT OF THE CASE

A. Trial Testimony of Fleetwood

The scene of this homicide was the second floor apartment of co-defendant Daniel Pregent.[5] When Van Arsdall visited the Pregent apartment earlier in the day on December 31, 1981,

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[1] See discussion hereafter in Argument I.

[2] Hereinafter sometimes referred to simply as "Van Arsdall

[3] *Van Arsdall* v. *State*, 486 A.2d 1 (Del. 1984).

[4] See discussion hereafter in Argument II.

[5] Direct examination of Robert E. Van Arsdall in trial transcript volume X at pages 41 through 58, as contained at pages 141-157 of the Joint Appendix, and hereinafter cited as "J.A. 141-157."

Pregent had shown him the rear entrance and said Van Arsdall could visit him by utilizing the back steps. J.A. 141-142. At approximately 11:30 p.m. on December 31, 1981, Van Arsdall returned to the Pregent apartment by this rear stairway.[6] J.A. 141-142.

Robert J. Fleetwood, the tenth of sixteen prosecution witnesses, testified that he left his apartment "around 11:00" and walked across the hall to the apartment of Pregent, his neighbor. J.A. 81-82. The door of the Pregent apartment was open, and Fleetwood claimed that he observed Van Arsdall sitting on the bed and Pregent's feet hanging from the bed. J.A. 82-83. Prosecution witness Fleetwood did not know if Doris Epps, the homicide victim, was present in the Pregent apartment. J.A. 82-85.

Van Arsdall never acknowledged observing or being observed by Fleetwood after his evening return to the Pregent apartment *prior* to the Epps homicide. From the time that Van Arsdall returned to the Pregent apartment at approximately 11:30 p.m. until the Epps homicide, Van Arsdall acknowledged being seen only by Pregent[7] and Doris Epps. J.A. 141-157.

During the prosecutor's cross-examination at trial, Van Arsdall stated that the last time he had seen Fleetwood prior to the homicide was during his second visit in the afternoon and before his evening return. J.A. 166-167. This defense assertion that Fleetwood was unaware of the presence of Van Arsdall in

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[6] In the opening statement by defense counsel at trial, the Kent County Superior Court jury was advised that Van Arsdall entered the Pregent residence " . . . through a back door of the apartment *unseen by anyone except Danny Pregent* who admitted him . . ." J.A. 64 (emphasis added).

[7] Pregent was a co-defendant of Van Arsdall also charged with the first degree murder of Epps. Pregent was tried separately and acquitted at a later proceeding. In his January 5, 1982 custodial statement, Pregent informed the police investigating the homicide that he did not think Van Arsdall had murdered Epps. J.A. 7-8. Apparently, Pregent's successful defense was that he slept through a knife murder in his own bed and he had no explanation for the blood on his pants. J.A. 5-6, 43, 53, and 56-57.

the Pregent apartment immediately prior to the homicide was contradicted by Fleetwood, who claimed to have seen Van Arsdall there at approximately 11:00 p.m. J.A. 81-83. This contradiction between the testimony of Fleetwood and Van Arsdall was highlighted by the prosecutor's provocative cross-examination of Van Arsdall. J.A. 166-168.

A defense presented at trial and asserted in closing argument by defense counsel was that the actions of Van Arsdall after the homicide were inconsistent with the conduct of a guilty party. J.A. 195-197. During closing argument, defense counsel stated to the jury:

> Robert Van Arsdall tells you he goes across the hall. Foolishly and for no reason, he picks up the knife. He says he did not want to leave it there for Danny Pregent, and he did not know what Pregent would do if he had another weapon. But he takes this knife, the murder weapon. He takes it across the hall. He does not flee. He does not run out the back door where he came in and where, apparently, no one, with the exception of Daniel Pregent, saw him there.
>
> No, he does not do that. He goes across the hall where he knows Robert Fleetwood lives, and he knocks on the door. Jane Meiner [sic] answers when he says who is there. He says, "Bobby." She thinks it is Bobby Crain. She opens the door, and he goes inside. He tells them he has been in a fight, and he surrenders the weapon. He is not keeping the weapon from anybody. He does not resist.
>
> The weapon is taken away from him, and he tells them that there is something wrong across the hall. He tells Mark Mood and Jane Meiner that.
>
> I submit to you is that the action of a murderer? Is he going to take the murder weapon? What can be more incriminating than to go carrying around the bloody murder weapon, take it across the hall, tell other people what has happened, and not run away?
>
> This murder did not happen in Bobby Van Arsdall's apartment. This was a body in the kitchen of Daniel Pregent. But what are the actions of Robert Van Arsdall? J.A. 195-196.

This defense explanation for the actions of Van Arsdall in taking the murder weapon and revealing his presence to the individuals in the neighboring apartment was undercut by the prosecution's use of Fleetwood's testimony in cross-examining Van Arsdall. J.A. 166-167. The defense assertion at trial was that the direct testimony of Fleetwood notwithstanding, Van Arsdall's presence in the Pregent apartment immediately prior to the homicide was unknown to any of the occupants of the Fleetwood apartment. J.A. 64, 196. This was stressed by defense counsel while addressing the jury both in opening statement (J.A. 64) and in closing argument. J.A. 196.

B. Cross-Examination Of Van Arsdall

The significance of Fleetwood's trial testimony became apparent during the prosecutor's cross-examination of the defendant. J.A. 166-167. The prosecutor asked Van Arsdall a series of questions on cross-examination regarding why he took the murder weapon, a kitchen knife, across the hall to the apartment of Fleetwood. J.A. 166-167. First, Van Arsdall was asked by the prosecutor to confirm that he did take the knife across the hallway. J.A. 166. Second, the prosecutor asked Van Arsdall if he knew who was across the hall, and the defendant replied, "All I know, Fleetwood was across there." J.A. 166. Pursuing this cross-examination, the prosecutor next asked van Arsdall when he had last seen Fleetwood, and Van Arsdall replied that it was during his second visit to the Pregent apartment earlier that afternoon. J.A. 166. The prosecutor followed up by inquiring what Fleetwood was doing when Van Arsdall last saw him. J.A. 166-167. Continuing to pursue the matter, the prosecutor inquired: "That's all you thought was across the hall was Fleetwood?" J.A. 167. When Van Arsdall replied in the affirmative, the prosecutor asked the highly provocative question as to why Van Arsdall went over to the Fleetwood apartment after the homicide: "Are you sure you didn't go across the hall to kill him?" J.A. 167.

After Van Arsdall denied going to kill Fleetwood, the prosecutor asked a series of follow-up questions concerning how

Van Arsdall was holding the knife. J.A. 167-168. He asked if Van Arsdall was attempting to hide the murder weapon when he went to Fleetwood's apartment. J.A. 168. Finally, the prosecutor asked Van Arsdall why he had entered the Pregent apartment from the back door.[8] J.A. 168.

C. Evidence Of Pregent's Guilt

There was substantial evidence that co-defendant Pregent committed the Epps homicide. Both legs of Pregent's pants had blood stains below the knee on front and back. J.A. 178. The prosecutor argued in closing that the wet undershirt and socks found in a trash can of Pregent's bathroom (J.A. 54) belonged to Pregent and contained the victim's pubic and body hairs. J.A. 172.

The State of Delaware clearly thought that Pregent was involved in the Epps homicide, since Pregent was tried and, ironically, acquitted, at a subsequent trial.[9] In both his opening and closing argument, the prosecutor contended that even if Van Arsdall did not stab Epps, he was an accomplice of Pregent. (Trial Transcript volume II, at page 20, hereafter cited as Tr. II-20, and XI-7-8). In fact, the State requested an accomplice jury charge in the Van Arsdall prosecution. *Van Arsdall* v. *State*, *supra*, 10.

1. Pregent-Stevens Altercation

During the New Year's Eve party, there was an argument between Pregent and Ida Mae Stevens, another party guest. Prosecution witness Robert S. Crain described the argument between Pregent and Stevens, as follows: "Well, he wanted to

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[8] This line of cross-examination by the prosecutor of the defendant at trial clearly suggested that even if Van Arsdall did not admit seeing Fleetwood when the latter claimed he visited the Pregent apartment at "around 11:00," the jury should draw the inference that Van Arsdall crossed the hall to eliminate Fleetwood, a witness to his presence at the scene immediately prior to the murder.

[9] See footnote 7 at page 7 of Petitioner's Opening Brief.

fight, I believe he wanted to hit Ida Mae or something like that, and we had to sort of like hold him down and calm him down. He kicked a hole in the wall and everything." Tr. II-95. Alice Jane Meinier, another prosecution witness, also recalled that Pregent had to be restrained from fighting Ida Mae Stevens, and she witnessed Pregent kick a hole in the hallway wall while being so restrained. Tr. IV-54. Meinier described Pregent as being "wild" during the altercation with Stevens. Tr. IV-54. *See* J.A. 8-9. Meinier recollected that the incident involving Pregent and Stevens occurred sometime after 6:30 p.m. on December 31. Tr. IV-11, 55. Subsequently, both Fleetwood and Meinier left Fleetwood's apartment when Fleetwood went to get beer and Meinier used Pregent's bathroom. Tr. IV-55.

2. Scuffle In Fleetwood Apartment

When Fleetwood and Meinier left Fleetwood's apartment, Pregent became involved "in some sort of a scuffle" in Fleetwood's apartment, and glasses, ashtrays, and a table were broken. Tr. IV-55-56. After Fleetwood returned from the liquor store, he found his apartment messed up and he made everyone leave except Meinier and Mark Mood. J.A. 80-81. Although Fleetwood claims that he left again around 11:00 p.m. to go across the hall to Pregent's residence (J.A. 82), Meinier testified that Fleetwood did not leave after returning from the liquor store. J.A. 138-139.

3. Arrest Of Pregent

Bruce Timmons of the Smyrna Police Department was the first policeman to enter Pregent's apartment. Tr. V-7. After confirming that the victim was dead in the kitchen, Timmons entered the unlit bedroom area, and with his flashlight noticed a subject lying on a sofabed wrapped in a blanket. Tr. V-8, IV-129. There was a large stain of what appeared to be blood next to and on the bed. Tr. IV-130. When Timmons pulled away the covers, the individual on the bed ". . . started to come up. He was then pushed back down on the bed and handcuffed . . . ." Tr. IV-130. In fact, Timmons testified that he needed

assistance in handcuffing Pregent. Tr. IV-130. Timmons, after arresting Pregent, took him into the hallway, where he noticed Corporal Howard Fortner with Van Arsdall and Meinier. Tr. IV-133. He observed that Van Arsdall had what appeared to be blood stains on his clothing. Tr. IV-133. Timmons advised Fortner that Van Arsdall had blood on his clothing and told Fortner to arrest Van Arsdall.[10] Tr. IV-134.

D. Denial Of Confrontation

The Constitutional error which was the basis for the reversal of Van Arsdall's convictions by the Delaware Supreme Court occurred during the cross-examination of Fleetwood.[11] J.A. 99-116. On direct examination, Fleetwood placed Van Arsdall in the Pregent apartment immediately prior to the Epps homicide. J.A. 81-85. Defense counsel attempted to cross-examine Fleetwood concerning his possible bias or interest in testifying on behalf of the State. J.A. 99-116

When defense counsel attempted to cross-examine Fleetwood concerning his August 6, 1982 arrest on a charge of being drunk on the highway,[12] the prosecutor objected. J.A. 100. He objected, first, that the inquiry as to the witness' bias was not relevant, and, second, that "any remote relevance" was outweighed by concerns of prejudice to the State and confusion of the issues. J.A. 107-108. After a lengthy voir dire examination

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[10] Defense contended the police made a hasty arrest at the scene of both Pregent and Van Arsdall within nineteen minutes after being notified. J.A. 63 and 200.

[11] Both the Petitioner and Amicus Curiae concede that the Confrontation Clause was violated by the trial judge's erroneous restriction on defense cross-examination as to interest or bias of a prosecution witness. Accordingly, this issue is not before the Court. *See United States* v. *Leon*, 486 U.S. ——, 82 L.Ed.2d 677 (1984), reh. den., 82 L.Ed.2d 942.

[12] Being drunk on the highway is a violation of DEL. CODE ANN. tit. 21 § 4149 (1979), conviction for which carries a possible prison sentence of up to thirty days for a first offense. DEL. CODE ANN. tit. 21 § 4205(a) (1979).

of the witness outside the presence of the jury and argument from counsel, the judge sustained the objection. J.A. 110.

1. Fleetwood's Deal

The purpose of attempting to cross-examine Fleetwood concerning his arrest on or about August 6, 1982 was to show his possible bias or interest in testifying favorably for the State. J.A. 100-116. When Fleetwood appeared in the Kent County Court of Common Pleas on August 31, 1982, he and his attorney were able to strike a deal with the Delaware Attorney General whereby his crimninal charge would be dropped in exchange for his appearing at the Attorney General's office to discuss his testimony in the Van Arsdall prosecution. J.A. 102-103. A notice of nolle prosequi stating that the charge against Fleetwood was dropped for "insufficient evidence" was filed by the prosecutor in the Van Arsdall case. J.A. 104. During his voir dire examination, Fleetwood outside the presence of the jury responded to the prosecutor's question as to his understanding of why his criminal charge was dropped, as follows: "Well, I did understand that I did feel that you wanted to make sure that I knew what I was talking about, and I do feel that you wanted to make sure I had my story together before coming in here. So that is why I did feel that it was dropped." J.A. 106.

In argument before the trial judge, defense counsel stated that the issue of interest or bias cross-examination was controlled by a 1979 decision of the Delaware Supreme Court known as *Wintjen* v. *State*, 398 A.2d 780 (Del. 1979).[13] J.A. 109. As a result of the trial judge's exclusion of the relevant bias cross-examination, defense counsel was prevented from showing the jury the factual basis for any potential bias or interest Fleetwood might have for testifying against Van Arsdall.[14] The importance of Fleetwood's trial testimony[15] was that he placed Van Arsdall at the Pregent apartment shortly *before* the Epps homicide (J.A. 81-85), and the use made by the prosecutor of Fleetwood's testimony in cross-examining Van Arsdall. J.A. 166-168. During his cross-examination of Van Arsdall, the prosecutor asked the defendent if he went across the hall to Fleetwood's apartment after the Epps homicide in order to kill Fleetwood. J.A. 167.

[13] The same Superior Court judge who presided in *Wintjen* presided over this prosecution of Van Arsdall.

During closing argument, defense counsel pointed out to the jury that the prosecution presented sixteen witnesses and introduced seventy-five exhibits during nine days of testimony in an attempt to establish its circumstantial evidence case against Van Arsdall.[16] Tr. XI-101-102. A major assertion by the defense in closing argument was that if Van Arsdall had

[14] The case against Van Arsdall was wholly circumstantial in nature, and no one, including Pregent, claimed to have witnessed Van Arsdall committing a murder. *Van Arsdall* v. *State*, *supra*, 5. J.A. 43. In fact, Pregent's January 5, 1982 custodial statement was that Pregent did not know who had killed Doris Epps, he did not think Van Arsdall had perpetrated the homicide, and his suspicion was that the murder was committed by "a jealous boyfriend." J.A. 6-8. In this respect, the facts in the case at bar are distinguishable from this Court's 1974 decision in *Davis* v. *Alaska*, 415 U.S. 308 (1974). In *Davis*, the conviction was reversed when defense counsel was prevented from cross-examining a prosecution witness as to his juvenile record. The distinction in *Davis* was that the unconfronted prosecution witness, Richard Green, was "crucial." *Id.*, 310. In a case, such as this, where all prosecution evidence is circumstantial in the sense that no witness can testify to having seen or heard the homicide, there is no witness who can be identified as "crucial." Any attempt to limit confrontation rights only to "crucial" prosecution witnesses is misguided and an illogical exercise in the wholly circumstantial evidence case.

[15] Meinier denied that Fleetwood left his apartment after returning from the liquor store. J.A. 138-139.

[16] Jury deliberations also extended over two days. *See Van Arsdall* v. *State*, *supra*, 5, for a discussion of the circumstantial nature of the State's case.

entered the Pregent apartment from the rear stairs *unobserved by anyone except Pregent*, why would Van Arsdall as a murderer or murder accomplice *reveal* himself by going across the hall with the bloody murder weapon and knocking on Fleetwood's apartment door. J.A. 196 and Tr. XI-109. Van Arsdall did not observe Fleetwood upon his return to the Pregent apartment, and Meinier denied that Fleetwood left his apartment at the time when Van Arsdall would have been present (J.A. 138-139); thus, under these circumstances, the highly provocative suggestion made by the prosecutor that Van Arsdall went across the hall after the Epps homicide to kill Fleetwood undercut Van Arsdall's explanation and defense. This homicide did not occur in Van Arsdall's residence, and the only other individual apart from Pregent who could place Van Arsdall at the scene prior to the murder was Fleetwood.

2. The Blake Murder

At trial defense counsel also wanted to cross-examine Fleetwood concerning the fact that he was a suspect of the Smyra Police Department in the August 21, 1982 murder of Anthony Blake.[17] J.A. 111. The purpose of the second proposed area of inquiry to demonstrate bias or interest of Fleetwood in testifying as a prosecution witness was the fact that Detective Bowers, who was also the chief investigating officer in the Epps

[17] The Delaware Supreme Court in *Van Arsdall* v. *State*, *supra*, 7 at fn. 3, stated that it was not necessary to determine whether the trial court had erred in preventing defense counsel from cross-examining Fleetwood about the Blake murder investigation, since the convictions were being reversed on the basis of the other confrontation violation, but the Delaware Supreme Court did ". . . note that the presumption in favor of cross-examination requires that an accused be given some latitude to search for agreements or understandings, even where no actual or communicated deal exists." Even if this Court determines that the Delaware Supreme Court was incorrect, this case must be remanded in order to permit the State appellate court to rule on the other confrontation denial regarding the Blake murder.

homicide, had picked up Fleetwood and taken him to Blake's funeral and in the presence of Blake's mourners and relatives questioned Fleetwood about Blake's murder shortly before the commencement of Van Arsdall's trial. J.A. 111-112. The purpose of this proposed defense cross-examination was to interrogate Fleetwood regarding whether he considered himself a suspect in the Blake murder investigation and if Fleetwood felt he was a suspect whether that affected his testimony for the State. J.A. 112.

Again, the prosecutor objected to this attempted bias or interest cross-examination of Fleetwood on the ground of relevance and the assertion that any possible relevance was outweighed by the danger of unfair prejudice to the State, confusion of the issues, or misleading of the jury. J.A. 112. As to the Blake homicide cross-examination, defense counsel again asserted to the trial judge that the defense was entitled to inquire into whether Fleetwood then considered himself to be a suspect in the Blake murder investigation in order that the jury could make an independent assessment of the witness' possible bias or interest. J.A. 114-115. Once more, the trial judge sustained the State's objection to the bias or interest cross-examination of Fleetwood concerning the Blake homicide ". . . on the entire line of questioning."[18] J.A. 115.

[18] Thus, the trial judge denied Van Arsdall the right to confront Fleetwood not only as to the fact that the prosecutor had recently dropped criminal charges against Fleetwood in another court, but Van Arsdall's jury was prevented from hearing the defense cross-examination of Fleetwood regarding the fact that Fleetwood was a suspect in the very recent murder of Anthony Blake. It is not implausible to think that a prosecution witness who is a suspect in another homicide will attempt to curry favor with the same police officer by rendering helpful prosecution testimony in a different homicide trial. The Van Arsdall jury in assessing the possible bias or interest of Fleetwood was entitled to hear both that as a result of a deal with the prosecution criminal charges had been dropped against Fleetwood and that Fleetwood was a suspect or at the time of trial considered himself to be in a second murder investigation being conducted by the Smyrna Police Department. Today, the Blake homicide in 1982 remains unsolved, and Mark Mood

SUMMARY OF ARGUMENT

I. A defendant should be "acquitted or convicted on the basis of all of the evidence which exposes the truth." *United States* v. *Leon*, *supra*, 684 (1984). The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees a criminal defendant the opportunity to expose the bias of an important prosecution witness. The holding of the Delaware Supreme Court in *Van Arsdall* v. *State*, *supra*, requiring that a defendant have the threshold opportunity to expose some bias of an important prosecution witness prior to any permissible discretionary limitation on cross-examination is consistent with this Court's decision in *Davis* v. *Alaska*, *supra*. *Harrington* v. *California*, 395 U.S. 250 (1967) only establishes a minimum federal standard allowing an examination for harmlessness where the error complained of involves the erroneous admission of harmless testimony and does not require the Delaware Supreme Court to review the error in this case for harmlessness.

II. In reversing these convictions, the Delaware Supreme Court employed its State harmless error rule. Del. Super. Ct. Cr. R. 52 (a). There is no federal harmless error rule applicable to state courts other than the minimum standard enunciated in *Chapman* v. *California*, 386 U.S. 18 (1967), reh. den., 386 U.S. 987. Amicus Curiae is improperly attempting to federalize a harmless error rule applicable to State courts, but there is no such dual source of law apart from the minimum standard of *Chapman*. *See generally Michigan* v. *Long*, 463 U.S. 1032, 1040-1044 (1983). When the Delaware Supreme Court is utilizing its own State harmless error rule, it is free as a matter of State law to afford greater protections to its citizens than required by *Chapman*. *See generally Connecticut* v. *Johnson*, 460 U.S. 73, 81 and 91 (1983). Such State action by the Dela-

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(another occupant of Fleetwood's apartment on December 31, 1981), who had previously been arrested for the Blake homicide in Smyrna, Delaware was released from custody when a witness recanted his prior incriminating statement against Mood.

ware Supreme Court is not susceptible to any federal right of review on certiorari by the United States Supreme Court. *See Michigan* v. *Long*, *supra*, 1043-1044. Thus, this Court is without jurisdiction to determine if Delaware has fashioned an improper State harmless error rule, as long as the minimum protections of *Chapman* are assured.

III. The facts and circumstances of this case require a reversal of the jury verdicts even under the minimum federal harmless error standard of *Chapman* v. *California*, *supra*, 22, 24. Both the Petitioner and Amicus denigrate the significance of Fleetwood's testimony. Fleetwood did not merely reiterate facts conceded by defense. The contention of the defense was that someone who had just committed a murder would not voluntarily reveal his presence at the scene to other individuals otherwise unaware of his return to Pregent's apartment. The testimony of Fleetwood that he had observed Van Arsdall at the Pregent apartment around 11:00 p.m. placed in issue before the jury the question of whether Van Arsdall went to the Fleetwood apartment after the Epps homicide as an innocent act or as an attempt to eliminate a potential witness to his presence at the homicide scene. The prosecutor made skillful use of this issue by pointedly asking Van Arsdall during cross-examination if he had gone to the Fleetwood apartment to kill Fleetwood. Under such factual circumstances, it cannot be found beyond a reasonable doubt that the total in limine prohibition of relevant bias cross-examination of a prosecution witness did not contribute to the convictions. *Chapman* v. *California*, *supra*, 23-24.

IV. The contention of Amicus Curiae only that an appellant bears the burden of proof in establishing that a constitutional error was harmful in order to be entitled to a reversal is directly contrary to the formulation of the minimum federal harmless error rule in *Chapman* v. *California*, *supra*, 24. *Chapman* requires that the beneficiary of a constitutional error prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Id.* The

beneficiary of the constitutional error in this case was the prosecution since the trial judge erroneously prohibited the criminal defendant from introducing evidence helpful to the accused.[19] Without citation of any precedent and without presentation of any sound policy justification, Amicus contends that the Delaware Supreme Court should have required Van Arsdall ". . . to demonstrate that the restriction actually and materially prejudiced his defense."[20] The position of Amicus stands *Chapman* v. *California supra*, on its head, with no justification except to make the task of a criminal defendant

[19] At issue is the wrongful exclusion by the trial judge at the request of the prosecution of evidence favorable to the defendant. Amicus at page 14 of their Brief in claiming that this action by prosecutor/trial judge is equatable to any attempt by defense counsel ". . . to sow technical errors at trial for the sole purpose of obtaining a reversal on appeal" is obviously barking up the wrong tree. If there is any "game" [Amicus Brief p. 14] being played in the criminal justice process, it is by the prosecutor/trial judge who misguidedly think that only the prosecution is permitted to present evidence at trial. This situation is to be contrasted to the case where the trial judge has improperly admitted evidence against an accused for a jury's consideration. *See Harrington* v. *California*, 395 U.S. 250 (1969) (improper admission of pre-trial statements of two co-defendants who did not testify, but whose statements implicated Harrington by placing him at the scene of the robbery); and *Motes* v. *United States*, 178 U.S. 458 (1900) (Improper admission of pre-trial statement of escaped co-conspirator unavailable for cross-examination at trial). The important distinction between improper exclusion of defense evidence and improper admission of prosecution evidence is that in the former situation the jury is never permitted to hear evidence that an accused constitutionally should have been permitted to present.

[20] See discussion at pp. 17 and 9 of Amicus Brief, particularly fn. 21 at p. 17 thereof. Confrontation Clause violations are in the same category of Constitutional error as *Chapman* v. *California*, *supra* (improper comment by prosecution on defendant's failure to testify), where the beneficiary of the constitutional error is rightfully required to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained, and are readily distinguishable from cases alleging ineffective assistance of counsel, where an appellate court reviewing the matter may rightfully require the complaining defendant to point out how trial counsel was ineffective. *See, e.g., Strickland* v. *Washington*, ____ U.S. ____, 80 L.Ed.2d 674 (1984); and *United States* v. *Hasting*, 461 U.S. 499 (1983).

properly complaining of a constitutional deprivation and attempting to obtain a fair trial by means of appellate review more difficult.[21]

ARGUMENT

I. THE DELAWARE SUPREME COURT IS NOT REQUIRED UNDER THE CONFRONTATION CLAUSE TO APPLY A HARMLESS ERROR RULE TO A TOTAL PROHIBITION IN LIMINE OF RELEVANT BIAS CROSS-EXAMINATION OF A PROSECUTION WITNESS.

The rulings of this Court teach that a defendant should be "acquitted or convicted on the basis of all the evidence which exposes the truth." *United States* v. *Leon*, *supra*, 684 (1984) (quoting *Alderman* v. *United States*, 394 U.S. 165, 175 (1969), reh. den., 394 U.S. 934). The Confrontation Clause of the Sixth Amendment of the United States Constitution is designed to expose the truth and to "assure fairness in the adversary criminal process." *United States* v. *Cronic*, ____ U.S. ____, 80 L. Ed.2d 657, 666 (1984). The error found in this case by the Delaware Supreme Court is an error that prevented the exposure of truth. The defendant was denied the opportunity to expose the bias of a prosecution witness whose testimony was an important factor in his conviction. That error denied the defendant's right to be "acquitted or convicted on the basis of all the evidence which exposes the truth." *United States* v. *Leon*, *supra*.

[21] As contended by Amcus Curiae, prosecutors should not only be permitted to abridge the constitutional rights of a criminal defendant with impunity, but the prosecution should continue to enjoy such purloined advantage unless the victim of the constitutional deprivation can ". . . demonstrate that the restriction actually and materially prejudiced his defense." Brief of Amicus Curiae at p. 17. Put simply, the assertion is that not only may the prosecutor make deals with witnesses in exchange for their cooperation, but that a proecutor should be able to hide his conduct from the jury's scrutiny. Any public policy justification for such prosecutorial conduct is lacking.

The importance of Fleetwood's testimony must be emphasized from the outset. The Petitioner and Amicus Curiae (hereinafter Amicus) go to great lengths to persuade this Court that Fleetwood's testimony was wholly unimportant because Van Arsdall admitted that he was in co-defendant Pregent's apartment prior to the murder.[22] However, Van Arsdall never conceded in his statements to the police, in his testimony at trial or at any other time that he was seen in Pregent's apartment by Fleetwood, or anyone, other than co-defendant Pregent, prior to the crime. In opening remarks to the jury defense counsel emphasized that while it was admitted Van Arsdall was there he was "unseen by anyone except Danny Pregent who admitted him." J.A. 64-65. (Petitioner's Brief 8). The establishment of this fact was crucial to the defense. The thrust of Van Arsdall's defense was that had he participated in the murder, or committed it alone, he would have fled and would not have willingly revealed his presence at the scene to any third person. Therefore, the very act of his leaving the scene, crossing the hall and alerting others to the crime indicated his innocence. Although initially Fleetwood was used to place Van Arsdall at the scene prior to the murder, ultimately his testimony was of far greater value to the State. Given the nature of the defense, it became necessary for the State to offer the jury some reason, other than Van Arsdall's innocent explanation, for why he crossed the hall to Fleetwood's apartment. Of the sixteen prosecution witnesses who testified at trial, Feetwood *alone* provided any explanation for that fact favorable to the prosecution. The State's theory was simple and telling. Through Fleetwood's testimony it created the inference that Van Arsdall went to

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[22] Petitioner's argument that on summation at trial defense counsel argued that Fleetwood's testimony was irrelevant is either disingenuous or naive. Defense counsel had been precluded from making any record from which Fleetwood's bias could be argued to the jury. Consequently defense counsel was left to make the best of a bad situation wholly of the State's making. J.A. 186-189. It is outrageous that after having prevented Van Arsdall at trial from making any such record and arguing it to the jury the State should now point to that fact as supporting its case on appeal.

Fleetwood's apartment carrying the murder weapon in order to kill Fleetwood and thus eliminate the only witness to his presence in Pregent's apartment. Further, the theory went, his murderous intent was only thwarted when Van Arsdall realized that Fleetwood was not alone in his apartment. Thus, Fleetwood's testimony became crucial because it provided the *only* explanation the State ever offered for Van Arsdall's behavior in going across the hall consistent with his guilt.

This was a case constructed entirely of circumstantial evidence. Even after the presentation of all the evidence the State candidly admitted in summation that it was unsure of exactly what events occurred in Pregent's apartment and whether both of the defendants or only one acting alone had committed the crime. Tr. XI-8. There was no eyewitness testimony regarding the murder. Two persons could have committed the crime. While there was no issue that Van Arsdall was present in the apartment at the time the murder occurred, he testified, however, that Pregent alone killed the victim. Pregent did not testify at Van Arsdall's trial. Ultimately, then, the jury was required to exercise its judgment in deciding whether Van Arsdall's innocent explanation for crossing the hall was true, or whether the State's alternative theory, offered solely through the use of Fleetwood's testimony, pointed to his guilt. It should be noted that at trial the State did not argue that Fleetwood's bias should not be exposed because he was an unimportant witness. The Petitioner should not now be permitted to mislead this Court about the importance of his testimony.[23] Given the probative effect of Fleetwood's testimony and its importance to the State, the exposure of his possible bias was vital to the defense and guaranteed by Van Arsdall's right to confrontation.

Historically, this Court has held that the right to confrontation through cross-examination is a substantial right funda-

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[23] See Argument III hereafter.

mental to a fair trial.[24] In cross-examination the "partiality" of a witness is "always relevant as discrediting the witness and affecting the weight of his testimony." *Davis* v. *Alaska*, *supra*, 316, quoting 3 A. J. Wigmore, *Evidence* § 940 at p. 775 (Chadbourn rev. 1970). Further, this Court has stated that "exposure of a witness' motivation in testifying is a proper and important function of the Constitutionally protected right of cross-examination." *Davis* v. *Alaska*, *supra*, 316-317. *See Greene* v. *McElroy*, *supra*, 496. Recognizing the importance of bias cross-examination, this Court only last year stated that under *Alford* v. *United States*, *supra*, "a trial court *must* allow some cross-examination of a witness to show bias" [emphasis added] and that *Davis* "holds that the Confrontation Clause requires a defendant to have some opportunity to show bias on the part of a prosecution witness." *United States* v. *Abel*, 469 U.S. ____, 83 L. Ed.2d 450, 456 (1984). Moreover, this Court has recently written that where the defendant has been deprived of an opportunity to expose a witness' bias *Davis* entitles the defen-

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[24] *Davis* v. *Alaska*, *supra*, 315-316 (essential purpose of confrontation to secure opportunity of cross-examination); *Smith* v. *Illinois*, 390 U.S. 129 (1968) (confrontation a fundamental right); *Brookhart* v. *Janis*, 384 U.S. 1, 3 (1966) (concession by respondent properly made that denial of cross-examination is constitutional error of the first magnitude); *Pointer* v. *Texas*, 380 U.S. 400, 403 (1965) (right to confrontation as fundamental and essential to fair trial as right to counsel); *Turner* v. *Louisiana*, 379 U.S. 466, 472-473 (1965) (trial by jury necessarily implies full judicial protection of right to confrontation); *Green* v. *McElroy*, 360 U.S. 474, 496-497 (1959) (right to confrontation and cross-examination immutable and zealously protected); *In re Oliver*, 333 U.S. 257, 273 (1948) (right to examine witnesses against defendant basic to our system of jurisprudence); *Alford* v. *United States*, 282 U.S. 687, 692 (1931) (right of cross-examination essential to a fair trial); *Kirby* v. *United States*, 174 U.S. 47, 55 (1899) (right to confrontation a fundamental guarantee to life and liberty); and *The Ottawa*, 70 U.S. (3 Wall.) 165, 167 (1866) (cross-examination a matter of right). *See also* 5 Wigmore on Evidence § 1347 (3d ed. 1940). The roots of this right to confrontation are ancient. *See The Bible* Acts 25:16 (rev. stand. ed. 1952), "I answered that it was not the custom of the Romans to give up anyone before the accused met the accusers face to face, and had opportunity to make his defense concerning the charge laid against him."

dant to a new trial without any "specific showing of prejudice." *United States* v. *Cronic*, *supra*, 668. In this case both the Petitioner and Amicus concede that Respondent's right to confrontation was violated. (Petitioner's Brief 17 and Amicus Brief 11). Nonetheless, they argue that under *Davis* reversal is only required if the witness whose bias was unexposed was "crucial" and that this Court's decisions in *Chapman* v. *California*, *supra;* and *Harrington* v. *California*, *supra;* and its progeny [*Schneble* v. *Florida*, 405 U.S. 427 (1972); *Brown* v. *United States*, 411 U.S. 223 (1973); and *Parker* v. *Randolph*, 442 U.S. 62 (1979)] always require harmless error analysis of an admitted confrontation violation regarding the prohibition of bias cross-examination of a non-crucial witness. In order to respond to this assertion and to expose its fallacy careful attention must be paid to what the Delaware Supreme Court did and did not decide in this case.

Despite the efforts of Petitioner and Amicus to broad-brush the decision of the Delaware Supreme Court and its implications, the holding is actually extremely narrow. It holds that under the factual circumstances of this case, in which the witness' bias was "an important issue before the [trial] court and the excluded evidence was central to that issue" and where the trial court imposed a blanket prohibition against exploring that bias, thus violating the defendant's right to confrontation, it would assess error by a per se standard instead of examining the actual prejudicial impact of the error. *Van Arsdall* v. *State*, *supra*, 7. In doing so, it relied upon its previous decision in *Weber* v. *State*, 457 A.2d 674 (Del. 1983).

In *Weber* the Delaware Supreme Court determined that while a trial court has wide discretion to restrict the scope of cross-examination (*Id.*, 681-682), "A certain threshold level of cross-examination is Constitutionally required, and the discretion of the trial judge may not be interposed to defeat it." *Id.*, 682. In ascertaining whether sufficient bias cross-examination was allowed the Court stated it would look to whether (1) the jury was permitted to hear sufficient facts for it to draw

inferences as to the witness' reliability, and (2) whether defense counsel was permitted to establish a record adequate to argue the witness' bias to the jury. *Id.*, 682. More simply stated, the Delaware Supreme Court, both in *Weber* and *Van Arsdall*, has ruled that consistent with the right of confrontation the defendant must be allowed *some* opportunity to expose a witness' bias before the trial court may properly exercise its discretion to limit the scope of cross-examination.[25] While employing a "per se error" test, a careful reading of *Van Arsdall* in light of *Weber* reveals that the apparent harshness of such a test is considerably mitigated both by the method of its application and by the several exceptions thereto.

First, of course, the test will only be employed if the record reveals a total and blanket prohibition of all bias cross-examination.

[25] Far from being unique to Delaware this rule is widely employed. *United States* v. *Abel*, *supra*, 456; *United States* v. *Garza*, 754 F.2d 1202, 1208 (5th Cir. 1985); *United States* v. *Tracy*, 675 F.2d 443, 451 (1st Cir. 1982); *Reed* v. *United States*, 452 A.2d 1173, 1177 (D.C. App. 1982); *United States* v. *Hawkins*, 661 F.2d 436, 444 (5th Cir. 1981); *Chipman* v. *Mercer*, 628 F.2d 528, 530 (9th Cir. 1980); *Springer* v. *United States*, 388 A.2d 846, 855 (D.C. App. 1978); *United States* v. *Bass*, 490 F.2d 846, 857-868 (5th Cir. 1974); and *Hyman* v. *United States*, 342 A.2d 43, 44 (D.C. App. 1975). Other cases applying a harmless error analysis explicitly state that a trial court's discretionary authority to limit cross-examination only applies after the defendant has been permitted as a matter of right sufficient cross-examination to satisfy the confrontation requirement. *State* v. *Parrillo*, 480 A.2d 1349, 1358-59 (R.I. 1984); *Ransy* v. *State*, 680 P.2d 596, 597 (Nev. 1984); and *Carrillo* v. *Perkins*, 723 F.2d 1165, 1168, 1172 (5th Cir. 1984). Other courts implicitly follow the rule in applying harmless error tests where the jury heard some testimony at trial from which it could infer the witness' bias even though cross-examination on that issue was restricted. *State* v. *Parrillo*, *supra*; *United States* v. *Gambler*, 662 F.2d 834, 840 (D.C. Cir. 1981); *Kines* v. *Butterworth*, 669 F.2d 6, 13-14 (1st Cir. 1981), cert. dism'd, 421 U.S. 1006; *Commonwealth* v. *Wilson*, 407 N.E.2d 1229, 1246 (Mass. 1980); *State* v. *Pierce*, 414 N.E.2d 1038, 1043 (Ohio 1980); *State* v. *Patterson*, 656 P.2d 438, 440 (Utah 1982); *Hoover* v. *State of Maryland*, 714 F.2d 301, 305 (4th Cir. 1983); and *Carrillo* v. *Perkins*, *supra*, 1168, 1172. In *United States* v. *Duhart*, 511 F.2d 7, 9 (6th Cir. 1975), cert. dism'd, 421 U.S. 1006, the defendant was otherwise able to cast doubt on the witness' testimony and otherwise impeach it.

tion. Second, reversal will only be required if there is a strong showing that prejudice is implied. This can be understood from the reliance in *Weber* on the analysis of the effect of the automatic reversal rule as found in *Chipman* v. *Mercer*, *supra*, 683. The reasoning there is as follows. Initially, of course, the bias of the witness is always relevant. *Davis* v. *Alaska*, *supra*, 316. If a defendant then proposes to expose a witness' bias no confrontation violation occurs unless the denied area of cross-examination is of considerable relevance. *Chipman* v. *Mercer*, *supra*. In turn, the degree of relevance bears a close relation to whether the denial of confrontation was prejudicial. *Id.* Thus, an implication or presumption of prejudice arises where the defendant has been prohibited from exposing, through cross-examination, the considerably relevant bias of a prosecution witness. As Amicus notes (Amicus Brief p. 10), there are certain kinds of error which raise a presumption of prejudice because in ultimate effect it is impossible for an appellate court "to determine the actual or probable impact of the error" and because a substantial trial right is involved. It would appear that this is precisely the concept applied by this Court in *Alford* v. *United States*, *supra*. There, even though the defendant could not state what facts he hoped to develop on cross-examination this Court found that he had the right to pursue cross-examination and that:

> The trial court cut off *in limine* all inquiry on a subject to which the defense as entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error. *Id.*, 694

This same line of analysis was endorsed in *Smith* v. *Illinois*, *supra*, and applies fully to the case at bar. Nothing in *Alford* suggests that on appeal the defendant was obligated to prove that he was prejudiced by the trial court's prohibition against cross-examination. To the contrary, the defendant could not even state what benefit to his case he hoped cross-examination would gain, yet prejudice was presumed because the defendant was deprived of a "substantial right . . . essential to a fair

trial."[26] In the case at bar the defendant was in pursuit of bias and the record suggests the possibility of bias was real. J.A. 118. There can be no doubt that Fleetwood's bias was a subject on which Van Arsdall was "entitled to a reasonable cross-examination." *Alford* v. *United States*, *supra*, 694. Consequently, here, as in *Alford*, the source of prejudice to the defendant should be no mystery. It must be presumed.[27] It is clear that the Delaware Supreme Court had this reasoning in mind when it pointedly noted that the issue of Fleetwood's bias was an "important" issue and that the excluded evidence was "central" to that issue. *Van Arsdall* v. *State*, *supra*, 7. Consequently, under the circumstances presented here, "The automatic reversal rule is not . . . entirely divorced from considerations of prejudicial error in its ultimate operation, even if it is so in its bare statement." *Chipman* v. *Mercer*, *supra*. The truth of this observation is abundantly clear if we examine the numerous exceptions to the rule as stated by the Delaware Supreme Court.

Van Arsdall does not establish a rigid automatic reversal rule mechanistically applied to every confrontation violation. In fact, in the very same decision the Delaware Supreme Court ruled that on this record the defendant did not have any absolute right to elicit the address of another State's witness, Jane Meinier, since the trial court apparently concluded that the question was asked to harrass or humilitate the witness. *Van Arsdall* v. *State*, *supra*, 7-8. *But see Smith* v. *Illinois*, *supra*, 131. The decision also makes it clear that the Court would always analyze a restriction (as distinguished from a total

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[26] *See* R. Pondolfi, "Principles For Application of The Harmless Error Standard," 41 U. Chi. L. Rev. 616 (1972), for the proposition that under *Alford* and *Smith* v. *Illinois* (a post-*Chapman* case) the very requirement of a showing of prejudice would deny a substantial right essential to a fair trial.

[27] Even though *Alford* was a federal case decided before *Chapman*, the presumption of prejudice is still either required because of the holding in *Smith* v. *Illinois* or under the theory that no appellate court under circumstances where evidence favorable to the defendant is improperly excluded can possibly measure the prejudicial impact of the error on the jury.

prohibition) of cross-examination for harmlessness.[28] *Van Arsdall* v. *State*, *supra*, 7; *Weber* v. *State*, *supra*, 683; and *Wintjen* v. *State*, *supra*, 29. That is to say, where there is no total prohibition, but a mere restriction of cross-examination, the court will apply the harmless constitutional error test under *Chapman* v. *California*, *supra*.[29] Further, the Delaware Supreme Court would not apply a per se error test under circumstances such as appeared in *Harrington* v. *California*, *supra; Schneble* v. *Florida*, *supra; Brown* v. *United States*, *supra;* or *Parker* v. *Randolph*, *supra*.[30] Both *Van Arsdall* and

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[28] The distinction between a mere limitation or restriction on cross-examination and its total prohibition must be emphasized since Petitioner attempts to blur the differences into insignificance. (Petitioner's Brief pp. 19, 28). For example, Petitioner states that *Davis* does not stand for the proposition that reversal is required if cross-examination of a witness has "in some way been impaired." (Petitioner's Brief p. 28). Van Arsdall agrees. The Delaware Supreme Court holds only that a "blanket prohibition against exploring bias" requires reversal. *Van Arsdall* v. *State*, *supra*, 7. Does the petitioner mean to say that cross-examination on the issue of bias can ever be "effective" if the defendant is totally foreclosed in limine from asking the witness any questions that would expose his bias, or that a total prohibition is a mere "impairment" of cross-examination? This also has application to the argument of Amicus that the Sixth Amendment guarantee must be viewed in reference to severity of deprivation. Van Arsdall can scarcely imagine a more severe deprivation than the total prohibition of the right to expose a witness' bias. *Strickland* v. *Washington*, *supra* is totally inaposite. There the Court alters the traditional test under *Chapman* to require the defendant to show specific prejudice caused by the alleged ineffectiveness of counsel for a variety of countervailing public policy reasons that have no application to a case such as this where the violation is easy to identify and where the presumption of prejudice is so important to substantial trial rights and the maintenance of public confidence in the fair administration of justice.

[29] *See Baynum* v. *United States*, 480 A.2d 698, 707 (D.C. App. 1984), where the court applied a test identical to the one employed by the Delaware Supreme Court. There the D.C. Court, finding that there was no in limine prohibition on bias cross-examination and sufficient cross-examination allowed from which the jury could infer bias, applied a harmless error test. The same kind of analysis would be permissible under *Van Arsdall*.

[30] The meaning of these cases and their inapplicability to the issue here presented will be discussed at greater length below. It must be initially

Weber make it quite clear that the per se error test would even have no application if cross-examination *was* totally prohibited but the cross-examination was: (1) cumulative as to the credibility of the witness, *Weber* v. *State*, *supra*, 683; (2) repetitive or unduly harrassing, *Van Arsdall* v. *State*, *supra*, 8; (3) related to a topic of marginal relevance, *Weber* v. *State*, *supra*, 682; (4) without probative value to the trier of fact, *Weber* v. *State*, *supra*, 682; (5) likely to have an adverse effect on the orderly conduct of trial, *Weber* v. *State*, *supra*, 682; or (6) likely to present any danger to a witness, *Van Arsdall* v. *State*, *supra*, 7 (citing with approval *Springer* v. *United States*, *supra*, 854.). Under any or all these conditions the Delaware Supreme Court would not find reversal required even if there was a total prohibition on cross-examination. In addition, the Court points out that after the defendant has been permitted *some* showing of bias the trial court may properly exercise its broad discretion to limit the extent of any further cross-examination. *Weber* v. *State*, *supra*, 681. In so doing it should consider a number of factors, including: (1) whether testimony of the witness is crucial; (2) the logical relevance of impeachment evidence to bias; (3) danger of unfair prejudice, confusion of issues or undue delay; and (4) whether evidence of bias is cumulative. *Id.*, 681. In the first instance, the trial court is not permitted to exercise its discretion so as to deprive the defendant of his right to confrontation. Given the limited application and many exceptions to this "per se error" test, it is clear that the rule is neither mechanistic nor fails to take into account the

stated, however, that *Harrington* was extensively argued to the Delaware Supreme Court by the Petitioner. The Delaware Supreme Court was, thus, fully aware that *Harrington* may create a federal standard requiring harmless error analysis in the special circumstances there found, i.e., (1) erroneous admission of harmless evidence cumulative of the defendant's own confession or statement by a non-testifying but confessing co-defendant; and (2) other overwhelming non-tainted evidence, including but not limited to inculpatory evidence from the defendant's own mouth.

practical realities of trial.[31] Further, Van Arsdall believes this approach is consistent with that taken by this Court in *Davis* v. *Alaska*, *supra*.

It is, of course, evident that this Court could have applied a harmless constitutional error analysis to the facts presented in *Davis*, as that rule had been announced earlier in *Chapman* v. *California*, *supra*. Instead, it found that the denial of the defendant's right to expose the witness' bias constituted "Constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."[32] *Id.*, 318 (quoting *Brookhart* v. *Janis*, *supra*, 3). Confronted by *Davis* and the preceding decisions of this Court regarding a denial of the right to cross-examination,[33] both Petitioner and Amicus are forced to make concessions of their own. The Petitioner concedes that it could never be harmless to render a defendant's ability to show the unreliability of a "key" witness ineffective (Petitioner's Brief p. 20). Amicus concedes it could never be harmless to deny a defendant any opportunity to examine any adverse witness and that it could never be harmless to deny a defendant the right to cross-examine a "crucial" adverse witness, but that harmless error analysis would be appropriate to the denial of the right to cross-examine a "minor" witness.[34]

[31] Indeed, the question arises whether this per se error test is any more "automatic" in its application that the rule announced for *Sandstrom* violations in *Connecticut* v. *Johnson*, *supra*. There, as here, the rule would appear automatically to require reversal under some, but not all, circumstances.

[32] The Petitioner notes that this language was quoted by the Court as a concession made in a party's brief (Petitioner's Brief p. 28, fn. 26), perhaps intending to suggest that because it originated in a brief that it is barren of meaning. Such a reading ignores the very next sentence in the opinion which states, "This concession is properly made." *Brookhart* v. *Janis*, *supra*, 3.

[33] *Smith* v. *Illinois*, *supra*; *Brookhart* v. *Janis*, *supra*; *Pointer* v. *Texas*, *supra*; and *Alford* v. *United States*, *supra*.

[34] These concessions may be dispositive of this case if the Court concludes, as it should, that Fleetwood was not a minor or unimportant witness, as both Petitioner and Amicus have already conceded that Van Arsdall's Sixth Amendment right of confrontation was violated by the trial court and now merely deny that Fleetwood's testimony was important.

(Amicus Brief 19, fn. 25) In focusing on the asserted "minor" or "cumulative" nature of Fleetwood's testimony and on the fact that in *Davis* this Court found the witness' testimony and the defendant's ability to impeach it important, they ignore the conceptual consequences of other language in *Davis*, as well as other salient factors that distinguish *Davis* from *Van Arsdall* and from *Harrington*.

In *Davis* there was no total prohbition on exposing the witness' bias through cross-examination. Although in *Davis* the defendant was to some extent able to show "whether" the witness was biased, he was only foreclosed from showing "why." *Davis* v. *Alaska*, *supra*, 318. Of course, Van Arsdall was totally foreclosed from even suggesting to the jury that Fleetwood had any bias. In fact, he was not even permitted to ask whether the charges against Fleetwood had been dropped, or any other question suggesting that Fleetwood was testifying as a result of a promise, deal or inducement. *See Wintjen* v. *State*, *supra*, 782. Secondly, in *Davis* there was at least a competing public policy interest to be considered in the trial court's decision to limit the opportunity to expose the witness' possible bias. In the case at bar the prosecutor objected on grounds of relevancy (J. A. 107). While the trial court apparently found the requested area of cross-examination relevant, it sustained the state's objection on the basis of D.R.E. 403.[35] Thus, here the reason for the trial court prohibiting all bias cross-examination would appear to be far less compelling, especially since the trial court was presumptively aware that in *Davis* this Court had ruled that the state's strong interest in protecting a juvenile must give way to the defendant's right to receive a fair trial. *Davis* v. *Alaska*, *supra*, 320. Fleetwood, of course, was not a juvenile and Van Arsdall can discern no important public policy interest in protecting the exposure of

[35] D.R.E. 403 is identical to F.R.E. 403. The basis of the court's ruling prohibiting the defendant from cross-examining Fleetwood on the issue of whether he then considered himself a suspect in a separate homicide investigation is less clear. J. A. 115.

his bias through cross-examination. Thus, in both instances this case presents a far more egregious record than that before the court in *Davis*. While Van Arsdall admits that *Davis* may not require automatic reversal for every denial of the right to expose a witness' bias through cross-examination (the Delaware Supreme Court itself has pointed out several exceptions which Van Arsdall believes this Court would also find compelling), Van Arsdall does assert that the reasoning used in *Davis*, if extended to this more serious deprivation of the right to confrontation, would equally require reversal. This is evident if we now consider certain distinctions between *Davis* and *Harrington*, upon which Petitioner so heavily relies.

Petitioner and Amicus assert that this case is analogous if not identical to *Harrington*. The argument is that in *Harrington*, *Schneble*, and *Brown*, this Court applied a harmless error analysis even though there was a violation of *Bruton* v. *United States*, 391 U.S. 123 (1968). In each of those cases the lack of opportunity to confront a confessing co-defendant was found to be harmless; while in the case at bar Van Arsdall was deprived of the opportunity to confront Fleetwood, so this error too must be harmless. This analogy has superficial appeal until a closer look is taken at the differences between *Harrington* and *Davis*.

The first distinction is that in *Harrington* this Court dealt with erroneously admitted evidence, while in *Davis* the erroneous exclusion of evidence was the basis for reversal. This distinction is crucial. Petitioner argues that *Motes* v. *United States*, *supra*, is a precursor to *Harrington* and stands for the proposition that a violation of the confrontation clause can be harmless. Indeed, *Motes*, although decided many years before recognition of a constitutional harmless error rule, is in line with *Harrington;* however, these cases must be seen for what they actually hold. Essentially, in *Motes*, this Court refused to reverse the conviction of a defendant who confessed his guilt at trial on the witness stand even though he was not permitted to confront a non-testifying witness whose statement implicating

him was erroneously admitted into evidence. The import of *Motes* and even *Harrington* and its progeny is found in *Alford* v. *United States*, *supra*, where the Court explains that the summary denial of the right to cross-examination is "distinguishable from the erroneous admission of harmless testimony." *Id. See Nailor* v. *Williams*, 75 U.S. (8 Wall.) 348 (1868). In each of the cases relied upon by the Petitioner what the Court actually confronted was a determination of the potential prejudicial impact of an erroneous admission of harmless testimony. In none of these cases, although confrontation was technically denied, was there any realistic showing that defendant would have exposed any bias on the part of the confessing co-defendant since in each of them the defendant admitted the truth of the confessing co-defendant's statement.[36] Thus, in none of these cases was the Court actually confronted with the realistic possibility that the defendant was truly unable to present his version of the case as a result of any erroneous exclusion of evidence. In such cases, where the defendant confesses his own guilt, or admits it on the witness stand, if the Sixth Amendment right to confrontation is implicated at all it is only in its most technical sense. This would admittedly also be the situation in the case at bar if Fleetwood's testimony were identical to Van Arsdall's in both content and probative effect. But, as has been demonstrated, this was not the case. In addition, *Harrington* and its progeny are much more narrowly drawn than the Petitioner would have it. In all of these cases, the Court was cognizant that the record consisted of other

[36] In *Harrington* one of the three confessing co-defendants took the stand and was cross-examined. The other two non-testifying co-defendants merely placed the defendant at the scene but without a gun, a fact which he himself admitted in his statement. Likewise in *Schneble* v. *Florida*, *supra*, *Brown* v. *United States*, *supra*, and *Parker* v. *Randolph*, *supra*, the Court dealt with erroneously admitted harmless testimony since in each case the defendant himself admitted either by confession or statement the truth of the non-testifying co-defendant's statement. Indeed, "the Constitutional right of cross-examination [cite omitted] has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence." *Parker* v. *Randolph*, *supra*, 73.

overwhelming non-tainted evidence which was not circumstantial in nature. All of the evidence against Van Arsdall was circumstantial in nature and none of it can be characterized as overwhelming. In *Harrington* v. *California*, *supra*, the court explicitly states:

> *The case against Harrington was not woven from circumstantial evidence.* It is so overwhelming that unless we say that no violation of *Bruton* can constitute harmless error, we must leave this state conviction undisturbed. *Id.*, 254 [emphasis added].

In cases dealing with erroneously admitted harmless testimony in which there is other non-circumstantial overwhelming non-tainted evidence against the defendant, this Court looks to the probable impact of the error on the minds of the jury. Thus, the distinction between *Davis* and those cases becomes more clear. In *Davis* the Court found that where evidence potentially favorable to the accused is improperly excluded and where, by implication, there is no admission of the truth of the testimony of the witness to be impeached by the defendant, he is entitled to present the excluded evidence of the witness' bias to the jury whether it would believe that evidence or not. In *Harrington* the jury was exposed to *all* the evidence, including the improperly admitted testimony, and, accordingly, this Court could determine in the context of all the other non-tainted evidence that the jury would have convicted on that evidence even without the tainted evidence.[37] But the obverse is true in

[37] Petitioner's analogy also breaks down with regard to the complained of evidence being "tainted." Unlike the erroneous admission of a non-testifying co-defendant's statement, Fleetwood's testimony was not "tainted" for it was not improperly admitted in the first place. He was a live witness, asserting no testimonial privilege and, but for the trial judge's erroneous ruling, subject to cross-examination. Thus, it is only the exclusion of the bias cross-examination which creates the taint in this case and not the admission of Fleetwood's direct testimony. Further, under *Bruton* the confessing co-defendant is constitutionally immune from cross-examination and the error committed results from the trial court allowing the statement or confession to be admitted into evidence in the first place, necessarily foreclosing cross-examination. In the case at bar the defendant could have presented his version of the case through bias cross-examination of Fleetwood had the trial court simply concluded that he had a right to do so.

the *Davis* situation. There the Court could not measure the prejudicial impact of the erroneous exclusion of evidence of the witness' bias and wrote:

> *We cannot speculate as to whether the jury, as sole judge of the credibility of a witness would have accepted this line of reasoning had counsel been permitted to present it.* But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof . . . of Petitioner's act." *Douglas* v. *Alabama*, 380 U.S. 415. *Davis* v. *Alaska*, *supra*. 317. [emphasis added]

It is no less true that the jury was entitled to know of Fleetwood's possible bias so that it could make an informed judgment as to his credibility in deciding whether to believe Van Arsdall's innocent explanation for crossing the hall and revealing his presence to others or the State's inculpatory explanation as provided through Fleetwood's testimony. In any case, this Court in *Davis* explicitly declined to speculate on what the probable impact on the minds of the jury would have been had they heard proper cross-examination on the issue of bias. Nor will it do, as Petitioner argues, to limit reversal for prohibition of bias cross-examination to "crucial" witnesses.

In the first place, neither an appellate court, nor a trial court, will always be able to determine how important a particular witness is to the prosecution's case. There are admittedly cases where an appellate court can point with ease to a "crucial" witness in the case. This is especially so if the case was not built on circumstantial evidence, or if there were a limited number of witnesses at trial. However, in other cases, such as the case at bar, it will be exceedingly difficult to identify any one witness as "key" or "crucial." The point here is that the defendant should have the right to expose the bias of any witness against him.[38] Thereafter, if it can be shown that there

[38] The better rule appears to be that a defendant is permitted to expose the bias of any witness and if the witness is "crucial" then the trial court should afford the defendant greater latitude to explore the witness' bias as a discretionary matter. *Springer* v. *United States*, *supra*; *United States* v. *Summers*, 598 F.2d 450, 460 (5th Cir. 1979); and *United States* v. *Barrantine*, 591 F.2d 1069 (5th Cir. 1979). But the defendant always should have the threshold right to show some bias. Under Petitioner's reasoning the defendant would only have the right to confront "star," "key," or "crucial" witnesses. Presumably, under Petitioner's reasoning, in a case built entirely on circumstantial evidence and where no witness could be so identified, the defendant could be denied the right of confrontation altogether, unless the defendant could point to some specific prejudice arising therefrom. If a defendant is only permitted to confront "crucial" witnesses, the constitutional guarantee of confrontation would have no objective meaning and would be reduced to a mere rule of appellate interpretation. It must be recognized that appellate courts throughout the country are not as alike as tiles on a kitchen floor. Obviously in a close case one appellate court may well identify a witness as "crucial" while another court could find the same witness relatively unimportant. Thus, the Petitioner urges a rule on this Court which would not result in uniformity of application. In addition, exposure to the jury of the fact that a witness may be testifying only in exchange for criminal charges being dropped against him may have a more ubiquitous impact on the verdict than hearing erroneously admitted evidence. For example, who is to say that if a jury concludes that one relatively unimportant state's witness is biased because of a deal concluded with the state that the jury would not view other more "crucial" state's witnesses somewhat more skeptically.

is reason to restrict the scope of cross-examination, the trial court may use its discretion to do so and an appellate court can then review that restriction for harmlessness.

Second, the nature of improperly excluded evidence deprives the appellate court from meaningfully measuring the extent of the error. R. Traynor, *The Riddle of Harmless Error* 68 (1970). It should, therefore, always require reversal unless the testimony sought to be impeached was cumulative both in *content* and *probative effect*, (*Id.*, 70), as was clearly not here the case.[39] Petitioner and Amicus suggest, however, that if

[39] Other commentators agree that the inherent inability of an appellate court to determine the potential impact upon the jury of certain particularized kinds of error, especially the wrongful exclusion of evidence favorable to the accused, should result in reversal. D. A. Winslow, "Harmful Use of Harmless Error in Criminal Cases," 64 Corn. L. Rev. 538, 558-559 (1979); and P. J. Mause, "Harmless Constitutional Error: The Implications of *Chapman* v. *California*," 53 Minn. L. Rev. 519 (1969).

reversal is required because the appellate court cannot evaluate the prejudicial impact of the error on the verdict than a waste of judicial resources would result. This is not true. As Chief Justice Traynor points out:

> If appellate judges forthrightly opened the way to a new trial whenever a judgment was contaminated by error, there would be a cleansing effect on the trial process. A sharp appellate watch would in the long run deter error at the outset, thereby lessening the need of appeal and retrials. *The Riddle of Harmless Error* 50.

If this Court disturbs the well settled rule that trial courts must permit *some* bias cross-examination it will only encourage appellate litigation. A belief by a trial court that it can totally prohibit bias cross-examination because it believes the witness unimportant (which in many cases it will not be able to accurately assess) will lead to a significant increase in appeals and retrials. On the other hand, if the trial court knows that it must allow some bias cross-examination before properly exercising its discretion to limit the scope of additional cross-examination, confrontation will necessarily be raised less frequently on appeal since it will more often be afforded at trial. Furthermore, the appellate courts would then have better records before them from which to determine the possible harmlessness of the error.

Confrontation is always a substantial right. There are, as has been discussed, circumstances under which a total prohibition of the right of cross-examination will not compel reversal. To say, however, that a total prohibition can always be viewed as potentially harmless invites trial courts and prosecutors to prohibit cross-examination and then leave the matter to the appellate courts to determine whether within the context of the whole record the prohibition was harmless. Likewise, to limit the right of confrontation to "crucial" witnesses would have the same result, since ultimately it would always be left up to the appelatee courts to determine whether the witness was in fact crucial. In many cases, of course, the trial court would

never be able to make such a determination.[40] Under the approach of the Delaware Supreme Court, however, and the logical extension of the *Davis* rationale to these facts, some record of the success, or lack thereof, of cross-examination would always be available to the appellate court. That is, if the defendant is given some opportunity to present his version of the case by presenting evidence of bias to the jury, the appellate court will always have a far better record from which to determine whether any further restriction on the scope of cross-examination affected the judgment. In addition, if this Court now announces that *some* bias cross-examination is required at trial there will be less chance that counsel would internationally create error.

Petitioner and Amicus suggest that if a total prohibition of bias cross-examination is not always examined for harmlessness there is a danger that the criminal process will become a "game" and that counsel will have some incentive to "sow technical errors at trial for the sole purpose of obtaining a reversal on appeal." (Amicus Brief p. 14) (Petitioner's Brief p. 22). It is preposterous to suggest that a defendant asserting his

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[40] For example, in the case at bar, Fleetwood appeared on the third of nine days it took the prosecution to present its case. At the time of his testimony he was the only state's witness who placed Van Arsdall on the scene prior to the crime. This would, indeed, make him a "crucial" witness if no one else in the case offered any testimony putting Van Arsdall at the scene. Should the trial court, therefore, assume at that point that no other state witness would place Van Arsdall on the scene and deem Fleetwood to be "crucial" and subject to bias cross-examination, or should the trial court conclude that some other subsequent witness would also place Van Arsdall there and make Fleetwood's testimony less than "crucial." Even assuming, on the basis of counsel's opening comments, the trial court concluded Van Arsdall would admit being on the scene, how could the trial court possibly have known what the ultimate probative effect of Fleetwood's testimony would be as used by the State to undercut Van Arsdall's defense. That use of Fleetwood's testimony did not occur until the State had rested its case and the defense had gone forward. Of course, then it was too late, even had the trial court now recognized the damage being done by the State, to allow exposure of Fleetwood's bias.

constitutional guarantee to confrontation by attempting to expose the potential bias of a prosecution witness is attempting to "sow error" in the record. Van Arsdall did not create the error in this record. The State, attempting to conceal its deal with its witness from the jury, did so. If this Court rules that a total prohibition of bias cross-examination can be examined for harmlessness, the prosecution will always have an incentive to object to the introduction of any evidence exposing the bias of any of its witnesses. Indeed, it can reasonably be anticipated that under such circumstances the prosecution would always do so. As evidence for this proposition, the Court need only look to the history of this issue in Delaware discussed in Argument II B.

If this Court now announces a rule attenuating a defendant's right to expose the bias of a prosecution witness can it be anticipated that the state will suddenly become more solicitous of a defendant's right to present his version of the case? Nor can we conclude that the appellate court will necessarily be eager to vindicate those rights absent any clear direction from this Court to do so.[41] While Petitioner and Amicus make a great

[41] Given this Court's recent emphasis on harmless error a serious question is now being raised as to whether lower appellate courts are merely paying lip service to the substantial rights of criminal litigants, while in practice using the harmless error test to affirm convictions even where substantial rights have been denied. *See* Francis A. Allen, "A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review," 70 Iowa L. Rev. 311, 329-334 (1985); and Thomas Y. Davies, "Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeals." 1982 Am. Bar. Found. Research J., 543, 602-606 (1982). The reliance by Petitioner and Amicus upon *Giglio* v. *United States*, 405 U.S. 150 (1972) in this regard is also worrisome. There the knowing failure by a prosecutor to correct perjured testimony requires a new trial if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . ." *Id.*, 154 (quoting *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959)). This standard is far from being "functionally equivalent" to the *Chapman* harmless error test. (Amicus Brief p. 24, fn. 29). Lifted wholesale from a pre-*Chapman* decision, this more stringent test would require reversal if there were any reasonable *possibility* that the error contributed to the verdict, while nevertheless,

deal out of the fact that a defendant is entitled not to a perfect trial but to a fair one,[42] Van Arsdall believes that an appellate court in reviewing the admitted deprivation of a right as fundamental as that of confrontation should apply more than a "no harm, no foul" analysis as Petitioner and Amicus apparently suggest. This so-called "correct result" test of harmless error has been severely criticized. *The Riddle of Harmless Error* 18-22. One major difficulty with this kind of analysis is that it erodes public confidence in the administration of criminal justice as much as automatic reversal for mere technical error once did. As Chief Justice Traynor suggests, once we take the purely pragmatic path of tolerating as harmless the denial of substantial trial rights, no one will ever be able to enter a courtroom confident of a fair trial. *Id.*, 19. In the long run

recognizing that in particular circumstances, such error would not always require reversal. *Cf. Motes* v. *United States*, *supra*. Moreover, this Court analyzes prosecutorial failure to disclose exculpatory material under a different standard from that employed in *Davis* v. *Alaska*, *supra*, for prohibition of bias cross-examination. *See*, *United States* v. *Bagley*, 473 U.S. ——, 87 L. Ed.2d 481, 491 (1985). This Court sits to do justice, not "logic." Van Arsdall can conceive of few, if any, circumstances under which this Court would feel compelled by the dictates of "logic" alone to condone as harmless the prosecution's knowing use of perjured testimony.

[42] "A defendant is entitled to a fair trial but not a perfect one." *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953). If, as Amicus maintains (Amicus Brief, p. 13), the purpose of trial is to determine the factual question of the defendant's guilt or innocence then that question may only be fairly answered by exposing the trier of fact to all of the evidence, including that which the defendant has to offer. It would appear that Amicus and Petitioner believe that a defendant has received a "fair" trial if he is convicted only on the basis of the evidence the State has to offer at trial, but excluding any evidence the defendant has to offer suggesting his innocence. For a jury to convict in ignorance of the defendant's version of the case not only fails to assure conviction following a fair trial, it does not even assure a "correct result." It is incredible that Petitioner and Amicus should assert that a defendant having been convicted only on the State's evidence received a "fair" trial and should thereafter be required to prove in an appellate court that he is only entitled to retrial if he can demonstrate that he was "prejudiced" by not being permitted to present his case to the jury.

"retrial is a small price to pay for ensuring the right to a fair trail." *Id.*, 22.

The right to confrontation is explicitly guaranteed by the United States Constitution in clear and concise language. Van Arsdall believes that while the right to confrontation may frequently be properly subject to judicial interpretation, that from the standpoint of maintaining public confidence in the fairness of the criminal process, all reasonable men of ordinary intelligence and experience would be shocked to learn that the confrontation clause does not guarantee a defendant the opportunity to reveal to the jury that a prosecution witness may be lying in order to curry favor with the state.

The Delaware rule, which is consistent with *Davis* v. *Alaska*, *supra*, is correct both theoretically and practically. It takes into account the interests both of the State and the defendant. The decision only requires the exposure of *some* bias cross-examination. After an appropriate objection by the State, the trial court would have its traditional wide discretion to limit the scope of cross-examination. Thereafter, if the defendant upon appeal asserted that his right to confrontation was denied the Court would assess any such error under the *Chapman* harmless constitutional error test. Initially, however the defendant would have been afforded his threshold right at trial to expose bias. Given the extremely narrow nature of this decision and the many exceptions mitigating against the harshness of the "per se error" test, together with the inherent reasonableness of the decision of the Delaware Supreme Court, this Court must affirm.

II. THIS COURT HAS NO JURISDICTION UNDER FEDERAL CERTIORARI REVIEW TO REVERSE A DECISION OF THE DELAWARE SUPREME COURT EMPLOYING A STATE HARMLESS ERROR RULE WHICH AFFORDS GREATER RIGHTS TO DELAWARE STATE CITIZENS THAN PROVIDED BY THE FEDERAL HARMLESS ERROR RULE OF *CHAPMAN*.

A. State Harmless Error Rule

Both the State of Delaware and Amicus concede that Van Arsdall's constitutional right to confront an adverse witness was denied by the trial judge's total in limine prohibition of interest or bias cross-examination. (Petitioner's Brief pp. 18-19, and Amicus Brief p. 11) Relying upon both the United States and Delaware Constitution provisions, the Delaware Supreme Court reversed the jury convictions. *Van Arsdall* v. *State*, *supra*, 6. U.S. CONST. amend, VI; and DEL. CONST. art. I, §7. Like all of the other fifty states, Delaware has a harmless error statute or rule. *Chapman* v. *California*, *supra*, 22; and Del. Super. Ct. Cr. R. 52(a). There is also a federal harmless error rule applicable to criminal proceedings in federal courts. F.R.Cr.P. 52(a); and 28 U.S.C. §2111. Nevertheless, the only "federal" harmless error rule applicable to state criminal proceedings is that of this Court in the 1967 opinion of *Chapman* v. *California*, *supra*.

As long as a state court affords the minimum protection of the federal harmless error rule of *Chapman* to a state criminal defendant who has been deprived of United States Constitutional rights, the state court has complied with any applicable federal protection that the beneficiary of a constitutional error prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Chapman* v. *California*, *supra*, 24. Beyond this minimum harmless error protection of *Chapman*, a state court as a matter purely of state law is permitted to afford its citizens greater protections than they might enjoy in a federal prosecution for violation of federal law.

See Connecticut v. *Johnson*, *supra*, 81-82, 88-89. *See also* discussion of federal/state dual source of law in *Michigan* v. *Long*, *supra*, 1040-1044.

The 1984 decision of the Delaware Supreme Court in *Van Arsdall* v. *State*, *supra*, has inherently as a matter of State law and under the particular circumstances of the case found that ". . . where the defendant was subject to a blanket prohibition against exploring potential bias through cross-examination, the trial court committed a per se error. Consequently, the actual prejudicial impact of such an error is not examined and reversal is mandated." *Van Arsdall* v. *State*, *supra*, 7. There is no basis for federal certiorari review unless this decision was rendered as a matter of federal law. *Michigan* v. *Long*, *supra*, 1040-1044. To understand this decision as a product of the Court's inherent superintending function of its trial courts, an examination of prior Delaware confrontation decisions is necessary.

B. Historical Development Of Delaware Rule

In 1979 the same Kent County Superior Court trial judge who presided in the first degree murder prosecution of Van Arsdall sat on the burglary/theft prosecution of Ray M. Wintjen. *Wintjen* v. *State*, *supra*. William Clark, identified in the Delaware Supreme Court Opinion as "the State's key witness," was an alleged accomplice of Wintjen who had given a written statement to the police at the time of his arrest. *Id.*, 782. When defense counsel attempted to cross-examine Clark as to whether a police officer suggested to him that he might be better off if he implicated Wintjen, the prosecutor objected and the judge without stating his reasoning sustained the objection. *Id.*

In reversing, *Wintjen* noted that bias is always relevant and there is no need to lay a foundation for bias cross-examination.[43] *Id.* Furthermore, this right to bias cross-examination

[43] Compare frivolous lack of foundation objection made by Van Arsdall prosecutor (J.A. 107) in the face of clearly controlling State precedent.

". . . is an essential element of the Constitutional right of confrontation." *Id. Wintjen* also stated, "In some cases, an improperly terminated cross-examination may be harmless error." *Id.* In noting that ". . . the jury heard little or no evidence about possible favorable treatment by the State," the Delaware Supreme Court relying upon *Chapman* could not ". . . say that the error was harmless beyond a reasonable doubt." *Wintjen* v. *State*, *supra*, 782. Finally, *Wintjen*, determined that the criminal defendant had not waived his right of confrontation ". . . by failing to pursue the State's objection with an offer of proof that Clark had, in fact, been offered special treatment.[44] *Id.*, 783.

Four years later, the Delaware Supreme Court was beset with a second egregious confrontation violation. In *Weber* v. *State*, *supra*, the trial court refused to permit the jury to hear that prosecution eyewitnesses to the alleged homicide had received cash payments from the victim's family prior to their testimony. The analysis of the confrontation violation in *Weber* is more extensive and complex than the earlier decision in *Wintjen*. *Weber* v. *State*, *supra*, 679-683. The 1983 *Weber* decision stated, "Clearly the question of bias was before the court, and the defendants had an absolute right to pursue it." *Weber* v. *State*, *supra*, 679-680. In finding it well settled that the bias of a prosecution witness is always relevant, *Weber* cited to both its prior decision in *Wintjen* v. *State*, *supra*, and *Davis* v. *Alaska*, *supra*, 316. *Weber* v. *State*, *supra*, 680.

A trial judge does not have absolute discretion in curtailing cross-examination of a witness for bias or interest; nevertheless, the trial judge in exercising his discretion may consider the logical relevance,[45] cumulative nature, and cruciality

[44] Detailed offers of proof were made at trial on Van Arsdall's behalf. J.A. 100-115.

[45] The trial judge in Van Arsdall denied the prosecutor's relevance objection, but sustained the objection under the Delaware State rule of evidence equivalent to F.R.E. 403. J.A. 107-110 and 112-115.

of the testimony, as well as the danger of unfair prejudice, confusion of issues, and undue delay. *Weber* v. *State*, *supra*, 681. Any possible right of discretionary curtailment by the trial judge was found absent in *Weber*, and the Delaware Supreme Court observed: ". . . it strains reason to perceive how cash payments made by the victim's family to a group of witnesses adverse to the defendants would not be a very proper subject of cross-examination at any time." *Id.* While noting that a trial judge has some discretion as to the scope of bias or interest cross-examination, *Weber* pointed out that, "A certain threshold level of cross-examination is constitutionally required. . . ." under both the United States and Delaware Constitutions. *Id.*, 682. *See*, *e.g.*, *Greene* v. *Wainright*, 634 F.2d 272 (5th Cir. 1981); and *Chipman* v. *Mercer*, *supra*.

Weber correctly noted that the focus in appellate review of confrontation violations ought to be on whether ". . . the jury was exposed to facts sufficient to draw inferences as to the reliability of the witness" and whether ". . . defense counsel had an adequate record from which to argue why the witness might have been biased." *Weber* v. *State*, *supra*, 682. *Weber* also pointed out that ". . . some topics will be of marginal relevance, and the trial court in such situations may properly prohibit cross-examination or allow only limited questioning." *Id.* The *Weber* Court cited *Davis* v. *Alaska*, *supra*, 317, as well as the United States and Delaware Constitutions. *Weber* v. *State*, *supra*, 683.

As here, the Delaware Attorney General in *Weber* argued to the Delaware Supreme Court that the trial judge's curtailment of confrontation was harmless error.[46] *Weber* v. *State*, *supra*, 683. In finding that the limitation on cross-examination was not harmless beyond a reasonable doubt, the Delaware Supreme Court in *Weber* said that, ". . . the standards used to determine

[46] The same plaintive contention of harmless error was made by the Delaware Attorney General in *Wintjen* and again before the Delaware Supreme Court in *Van Arsdall* v. *State*, *supra*, 7. Petitioner urges the same harmless error argument upon this Court.

if there is a violation of the confrontation clause in the first instance are similar, if not identical, to those used in deciding if the error was harmless." *Id.*, 683.

C. Superintending Authority Of Delaware Supreme Court

By 1984 it was obvious that in the exercise of its general authority to superintend the processes of its trial courts, the Delaware Supreme Court needed to resolve any possible question regarding the authority of trial judges in curtailing cross-examination of prosecution witnesses on the issue of bias or interest. Apparently, the message of the two reversals in *Wintjen* and *Weber* made no impression upon the trial judge in *Van Arsdall*, who, as noted, was the trial judge in *Wintjen*, even when defense counsel at trial twice attempted to point out the controlling authority of *Wintjen*. J.A. 109, 115. Under circumstances where a trial judge refuses to correct his past errors and there is a clear trial record (J.A. 109, 115), the Delaware Supreme Court has determined to send an unequivocal message to any still unmindful State trial judge.[47]

D. The Delaware Rule

When met with such intransigence by a trial judge (J.A. 109, 115) as to the proper exercise of discretion in curtailing defense cross-examination on the issues of bias or interest, the Delaware Supreme Court in 1984 attempted to formulate a clear State rule for a current and continuing problem in its lower courts. *Van Arsdall* v. *State*, *supra*, 6-7. As in *Wintjen* and

[47] At page 32 of Petitioner's Brief it is inferentially contended that Van Arsdall's trial judge cannot be viewed as an instrument ". . . of the prosecution bent on subverting the defendant's ability to present a defense . . . ."; nevertheless, no other explanation is offered by Petitioner as to why Van Arsdall's trial judge when twice cited to prior controlling State authority (a reversal of his own earlier decision) (J.A. 109, 115) still assists the prosecutor in hiding the prosecutor's deal with witness Fleetwood from the jury in a first degree murder prosecution.

Weber, the Delaware Attorney General in the *Van Arsdall* appeal argued that any deprivation of the confrontation right was harmless error because the testimony of Fleetwood "was cumulative in nature and unimportant." *Van Arsdall* v. *State*, *supra*, 7.

In reviewing the 1983 formulation in *Weber* that "the standards used to determine if there is a violation of the confrontation clause in the first instance are similar, if not identical, to those used in deciding if the error was harmless," the Delaware Supreme Court observed that a 1982 decision of the District of Columbia Court of Appeals in *Reed* v. *United States*, 452 A.2d 1173, 1176-77 (D.C. App. 1982), stated a test *consistent* with *Davis* v. *Alaska*, *supra*, and the ruling in *Weber*. *Van Arsdall* v. *State*, *supra*, 7. The importance of this comparison is that the Delaware Supreme Court is not saying that its test in both *Weber* and *Van Arsdall* is *identical* with or compelled by *Davis* v. *Alaska*, *supra*, but that it is merely *consistent* with it. *Van Arsdall* v. *State*, *supra*, 7. In fact, in citing to another District of Columbia Court of Appeals decision, the Delaware Supreme Court in *Van Arsdall* announced that its holding was limited to the facts of the case at bar ". . . where the defendant was subjected to a blanket prohibition against exploring potential bias through cross-examination, the trial court committed a per se error. Consequently, the actual prejudicial impact of such an error is not examined and reversal is mandated." *Van Arsdall* v. *State*, *supra*, 7. *See also Webb* v. *United States*, 388 A.2d 857, 858 (D.C. App. 1978). By 1984, the Delaware Supreme Court had determined that it was necessary to fashion a State rule consistent, but not necessarily identical, with that of *Davis* v. *Alaska*, *supra*, to handle a continuing problem of how its State trial courts dealt with the right of a defendant to cross-examine prosecution witnesses as to interest or bias.

1. Consistency With *Chapman*

The State harmless error formulation for confrontation violations in *Van Arsdall* exceeds the minimum federal standard of *Chapman* v. *California*, *supra*. This grant of additional rights to Delaware citizens is permissible as a matter of Dela-

ware, rather than federal, law. *Connecticut* v. *Johnson*, *supra*, 81-82, 88-89. Federal Constitutional standards for the conduct of criminal trials set only *minimum* standards below which a state may not fall; however, a state is still free to require higher due process standards as a matter of state law. *Cf. Cooper* v. *California*, 386 U.S. 58, 62 (1967). Any "federal" minimum standard of harmless error for Constitutional violations is only relevant if a state court has first determined the error to be harmless.[48]

2. Distinguished From *Michigan* v. *Long*

The Delaware Supreme Court's selection of its own State harmless error rule distinguishes this matter from *Michigan* v. *Long*, *supra*. Here there is no dual source of law (state and federal) as was at issue in *Michigan* v. *Long*, *supra*, 1040-1044. Harmless error is inherently a state law question when a state criminal prosecution is at issue. *Connecticut* v. *Johnson*, *supra*, 88-89 (Stevens, J., concurring). *Van Arsdall* relied upon the State Constitutional provision, and as long as the minimum standard of *Chapman* is met, Delaware is free as a matter of State law to afford greater protections to its citizens. *Connecticut* v. *Johnson*, *supra*, 91-92 (Powell, J., dissenting).

The decision of the Delaware Supreme Court in *Van Arsdall* reflects an exercise of its inherent supervisory power to demarcate the scope of harmless error in accordance with Delaware's need to preserve fair trials in the lower courts under its supervision.[49] *Van Arsdall's* treatment of *total in limine* prohibition

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[48] For example, in both *Chapman* v. *California*, *supra*, and *Harrington* v. *California*, *supra*, the state court declared the Constitutional error to be "harmless." *See also* discussion in *Connecticut* v. *Johnson*, *supra*, 88-89 (Stevens, J., concurring), and 91-92 (Powell, J., dissenting).

[49] In fashioning such a State harmless error rule, the Delaware Supreme Court may also have been cognizant of the questions raised by some legal commentators that the harmless error type of analysis may be utilized as a tool to deny criminal defendants fundamental trial rights. *See*, *e.g.*, Francis A. Allen, "A Serendipitous Trek Through the Advance-Sheet Jungle: Crimi-

of bias cross-examination as per se error is a reasonable response in view of the utter arbitrariness of the trial judge.

Inasmuch as there is no federal jurisdiction for the United States Supreme Court to review this matter, the writ of certiorari must be dismissed as improvidently granted.

III. UNDER THE FACTS OF THIS CASE REVERSAL OF THE CONVICTIONS OF VAN ARSDALL IS REQUIRED SINCE THE STATE HAS NOT MET ITS BURDEN OF ESTABLISHING BEYOND A REASONABLE DOUBT THAT THE CONSTITUTIONAL CONFRONTATION DEPRIVATION DID NOT CONTRIBUTE TO THE GUILTY VERDICTS.

Van Arsdall has previously asserted (Argument I above) that Fleetwood was an essential prosecution witness since Van Arsdall never conceded that his presence in Pregent's apartment was known to Fleetwood. The defense centered on the uncontroverted fact that after the murder Van Arsdall walked across the hall to Fleetwood's apartment carrying the murder weapon, knocked on the door and told the occupants of that apartment that something was wrong across the hall. The defense argued that this behavior was so inconsistent with that of a murderer it raised a reasonable doubt of guilt. Since no one, other than Van Arsdall, testified as to what happened in Pregent's apartment during the murder, this post-homicide conduct was an important basis on which the jury could judge his innocence.

Fleetwood was the one and only witness whose testimony the State used to argue that this behavior was not indicative of Van Arsdall's innocence. It was the only explanation offered by the State that his behavior in crossing the hall was consistent

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nal Justice in the Courts of Review." 70 Iowa L. Rev. 311 (1985); Thomas Y. Davies, "Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal," 1982 Am. B. Found. Research J. 543 (1982); and R. Traynor, *The Riddle of Harmless Error* (1970).

with guilt, and as that behavior was the lynchpin of the defense, Fleetwood's testimony became crucial to the State. Only by exposing Fleetwood's bias could Van Arsdall counter the probative effect of Fleetwood's testimony.

Petitioner has not sustained its burden of proving beyond a reasonable doubt that the concededly erroneous restriction on bias cross-examination did not contribute to the verdict. *Chapman* v. *California*, *supra*, 24. These facts do not permit a finding that this confrontation denial was harmless error.

IV. A CRIMINAL DEFENDANT DOES NOT BEAR THE BURDEN OF PROVING THAT A DENIAL OF THE RIGHT OF CONFRONTATION ACTUALLY AND MATERIALLY PREJUDICED HIS DEFENSE.

Amicus is attempting to stand this Court's 1967 decision in *Chapman* v. *California*, *supra*, 24, on its head, by arguing that a defendant, not the beneficiary of a constitutional error (in this case the prosecution), is required to establish that the erroneous restriction "actually and materially prejudiced his defense."[50]

Amicus cites no authority and presents no policy justification for its attempt to shift the burden of proof to the defendant contrary to the plain language in *Chapman* v. *California*, *supra*, 24. In a complete reversal of *Chapman*, Amicus complains that the Delaware Supreme Court before finding any violation of the Confrontation Clause should have required Van Arsdall ". . . to demonstrate that the restriction actually and materially prejudiced his defense." The short answer is that no such requirement exists for this category of constitutional deprivation.[51]

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[50] Brief of Amicus at page 17. See also discussion at page 9 and page 17 footnote 21 of Brief of Amicus.

[51] This situation is also distinguishable from the requirement that a defendant complaining of ineffective assistance of counsel at least specify how his trial counsel was ineffective. *See Strickland* v. *Washington*, *supra;* and *United States* v. *Hasting*, *supra*.

There is no sound policy reason for now reversing the requirement of *Chapman* by shifting the burden to a defendant as the non-beneficiary of a Constitutional error to prove beyond a reasonable doubt that the error complained of did contribute to the guilty verdict.[52] It is an insidious postulation to think that a prosecutor may deprive an accused of constitutional protections with impunity unless the *defendant* can demonstrate that such error was not harmless.

CONCLUSION

The judgment of the Delaware Supreme Court should be affirmed. In the alternative, this writ of certiorari should be dismissed as improvidently granted for lack of federal jurisdiction.

Respectfully submitted,

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November 13, 1985

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[52] Any alleged source of basic principles of modern American law (Amicus Brief p. 9) is a mystery to Van Arsdall.

No. 84-1279

In The Supreme Court of the United States

October Term, 1984

STATE OF DELAWARE,
Petitioner,

v.

ROBERT E. VAN ARSDALL,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

REPLY BRIEF FOR PETITIONER

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ARGUMENT

A. The automatic reversal rule adopted by the court court below is not supported by either constitutional policy or prior precedent.

Regardless of where one chooses to place the joint between error and remedy, the Confrontation Clause does not compel an appellate court to reverse a defendant's conviction for an erroneous preclusion of impeachment cross-examination unless, in a two-step inquiry, the court concludes: (1) that there is a reasonable likelihood that the precluded impeachment could have affected the jury's evaluation of the witness' credibility; and (2) if so, that there is a reasonable possibility that the not fully impeached testimony of the witness could have contributed to the guilty verdict. Pet. Br. at 29. In contrast, the court

below held that the Sixth Amendment not only enjoins an appellate court from undertaking the second step, but directs reversal without consideration of the prejudicial effect of the error. The issue in this case is which of these conflicting views accurately reflects the command of the Confrontation Clause.[1]

Except for arguing that the considerable harshness of the remedy adopted below is mitigated to some degree by its purportedly narrow applicability (Resp. Br. at 20-25), Van Arsdall offers little foundation, in either policy or precedent, to support the Delaware court's automatic reversal rule.[2] First, it is hard to discern any policy rationale for the rule. As in this case, if the error involves a restriction or limitation on the cross-examination of an in-court witness, the core value of the Confrontation Clause —a prohibition against prosecutions based on *ex parte* affidavits, procured from anonymous or available, but absent, accusers—[3] has not been seriously implicated. Admittedly, a trial court's procedural ruling that precludes all cross-examination of every prosecution witness, *see, e.g., Brookhart v. Janis*, 384 U.S. 1 (1966), may call forth an automatic reversal rule either because such a trial close-

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[1]Although the Ninth Circuit had previously expressed some support for a rule of automatic reversal (Brief for the United States as Amicus at 14 n.15), it has recently found a Confrontation Clause cross-examination error harmless, utilizing an analysis mirroring the appropriate two-level inquiry. *United States v. Monks*, 774 F.2d 945, 953-54 (9th Cir. 1985).

[2]Indeed, he concedes that the rule is overly broad since he agrees that there are situations where a trial court's total prohibition of a particular line of impeachment evidence may be considered harmless. Resp. Br. at 28, 31.

[3]*California v. Green*, 399 U.S. 149, 156-57 (1970); *id.* at 179 (Harlan, J., concurring).

ly parallels prosecution by *ex parte* affidavit or because the magnitude of the error makes its effect "inherently indeterminate." *Chapman v. California*, 386 U.S. 18, 52 n.7 (1967) (Harlan, J., dissenting). Those concerns simply are not present when, as here, the error involves not a structural alteration of the trial process, but a mistaken restriction on the extent of cross-examination of one otherwise cross-examined witness. In that case, the error is evidentiary, not structural; its effect can be isolated and traced. It is that type of error—relating to how evidence was presented to the fact-finder—that the courts have traditionally found amenable to case specific analysis for harmlessness or prejudicial impact.[4] No policy reason supports the Delaware court's conclusion that the federal constitution mandates reversal for an isolated evidentiary error.[5]

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[4]This dichotomy is reflected in the decisions of this Court identifying the appropriate remedy for errors involving the right to counsel. Where the government has committed the structural error of failing to provide counsel at trial, automatic reversal is appropriate. *Chapman*, 386 U.S. at 23 & n.8 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). However, where the error manifests itself in the admission of evidence procured by the prosecution, prior to trial in the absence of constitutionally required counsel, the evidentiary error has been held subject to case-specific scrutiny for harmlessness. *See, e.g., Moore v. Illinois*, 434 U.S. 220, 222 (1977); *Milton v. Wainwright*, 407 U.S. 371, 372 (1972). *See generally Rushen v. Spain*, 464 U.S. 114, 128 n.8 (1983) (Stevens, J., concurring) (recognizing structural/evidentiary distinction in determining appropriate remedy for constitutional error).

[5]Respondents also suggest that the automatic reversal rule is mandated because appellate courts are functionally incapable of meaningfully measuring the extent and impact of excluded impeachment evidence. Resp. Br. at 31. But this Court has expressly rejected such a suggestion, *United States v. Bagley*, 105 S.Ct. 3375 (1985), and even the court below refused to embrace it. *See* Pet. App. A-6 (if sufficient cross-examination permitted, appellate court must determine the harmlessness of any additional impeachment evidence which the trial court excluded).

Moreover, Van Arsdall's efforts to pull support for the lower court's rule from the precedents of this Court are unavailing. Initially, this Court's decision in *Alford v. United States,* 282 U.S. 687 (1931), relied upon by the Respondent (Resp. Br. at 21-22), is consistent with the two-step inquiry Petitioner believes the Confrontation Clause requires before a conviction may be reversed. In *Alford,* the trial court had abruptly precluded any cross-examination concerning a witness' address and business and had refused to alter its ruling, even after the defendant proffered that the purpose of the inquiry was to suggest bias by showing that the witness was being held in federal custody. When this Court concluded that the trial court erred when it "cut off *in limine* all inquiry on a subject to which the defense was entitled to a reasonable cross-examination," *id.* at 694, it did no more than rule that given the rudimentary nature of the inquiry and because the trial court's ruling had prevented the development of a record, it would presume that there was a reasonable likelihood that the excluded impeachment would have affected the jury's assessment of the witness' credibility.[6]

But this Court's ultimate conclusion that the error was prejudicial, so as to mandate reversal, came only after it performed the other inquiry of assaying the material significance of the witness' direct, and not fully impeached,

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[6]Because the heart of this dispute centers on whether the Delaware court was correct in its conclusion that the Confrontation Clause prohibits any inquiry into the harmlessness of the witness' unimpeached direct testimony, this Court need not decide whether this same presumption would be applied in Respondent's case, where the trial judge, out of the presence of the jury, allowed the defense to explore the subject and develop a record for appellate review.

testimony. *Id.* at 688, 692 (witness gave "damaging testimony with respect to various transactions of the accused" including "uncorroborated conversations of the defendant of a damaging character"). *Alford* does not support the action of the court below.

Nor, as Respondent urges, can *Harrington v. California,* 395 U.S. 250 (1969) be so easily dispatched on the basis that it involved the erroneous admission of testimony while cross-examination errors, as in *Davis v. Alaska,* 415 U.S. 308 (1974) and here, involve the exclusion of evidence. Resp. Br. at 27-30. In both situations, the constitutional violation is identical: a witness offering testimony favorable to the prosecution has been rendered unavailable for cross-examination. In *Harrington,* the unavailability was caused by the prosecutor's judicially sanctioned decision to join, in the interest of judicial economy, the prosecution of co-defendants; in *Davis* and here, the unavailability was caused by the trial judge's decision sustaining an evidentiary objection lodged by the prosecutor. In both cases, the result of the unavailability is the same: the trier of fact was exposed to evidence from a witness where the defendant has not been able to show its potential unreliability.[7] In either case, if that evidence, erroneously immunized from challenge, played no significant role in

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[7]*Harrington*'s focus on the impact of the witness' unimpeached testimony was nothing more than an application of the historical procedural principle that if further cross-examination of an in-court witness is precluded by his death, incapacity, or assertion of a valid testimonial privilege, the appropriate procedure is to strike his direct testimony. *United States v. Cardillo,* 316 F.2d 606, 613 (2nd Cir.), *cert. denied,* 375 U.S. 822 (1963). *See generally* E. Cleary, *McCormick on Evidence* § 19 at 48 (3rd ed. 1984).

the jury's determination of guilt, the appellate court is not compelled to reverse.

B. Fleetwood's testimony did not materially contribute to the jury's guilty verdicts.

Though not denying that almost every detail observed by Fleetwood during his momentary glimpse into Pregent's apartment dovetailed with his own recitation of the events prior to midnight (*see* Pet. Br. at App. 1-2), Van Arsdall argues that Fleetwood's testimony was significant. According to him, the prosecutor used Fleetwood's testimony during his cross-examination of Van Arsdall to suggest that Van Arsdall's appearance in Fleetwood's apartment after the murder was for the purpose of killing a witness who had seen him in Pregent's apartment prior to the murder. Resp. Br. at 4-5 & n.8. Then, the prosecutor supposedly offered to the jury that inference to rebut the defense argument that Van Arsdall's decision to go to Fleetwood's apartment, instead of fleeing from the scene of the crime, showed his innocence. Resp. Br. at 16-17, 44-45. Thus, the argument seems to run, even if the Delaware court wrongly applied a remedy of automatic reversal, this Court should affirm the decision because the restriction on cross-examination was harmful. The record makes his theory a mirage.

During his cross-examination of the respondent, the prosecutor never referred to Fleetwood's testimony.[8] Tr.

[8]Fleetwood had testified that his momentary and limited observation of Van Arsdall, Pregent, and the victim occurred when he, without any exchange of conversation, merely poked his head into Pregent's open doorway. Tr. III49-52 (Fleetwood) (JA 82-85). He never testified that anyone in the apartment saw him.

X70-89 (Van Arsdall). When he asked Van Arsdall why he went across the hall to Fleetwood's apartment, that inquiry was precipitated, not by any recall of Fleetwood's testimony, but by Van Arsdall's own response a few seconds earlier that "[a]ll I know, Fleetwood was across there." Tr. X78-79 (Van Arsdall) (JA166-67). During the entire cross-examination, the prosecutor never mentioned that Van Arsdall had sought to kill Fleetwood because he was a witness. If anything, his short inquiry of Van Arsdall, particularly as he pressed him concerning whether others were in Fleetwood's apartment, Tr. X78 (Van Arsdall) (JA166-67), was intended to suggest not that Van Arsdall sought to silence Fleetwood, but that he may have been on a homicidal rampage, bent on killing all the occupants.[9]

In addition, the prosecutor never offered to the jury an explanation of Van Arsdall's conduct based on Fleetwood's testimony. When in rebuttal summation, he responded to Van Arsdall's argument that the post-murder conduct suggested innocence, the prosecutor never mentioned Fleetwood or his testimony. Moreover, he never intimated that Van Arsdall's purpose was to kill a potential eyewitness. Rather, his only rejoinder was that, like the killing of Epps, Van Arsdall's subsequent actions were senseless and beyond explanation. Tr. XI115-16 (Reed) (JA 201-02).

Distilled to its essence, Van Arsdall's proffer of prejudice is nothing more than speculation that, unaided

[9]Ironically, while stating that he knew Fleetwood was in his apartment, based on an earlier visit to the party, Van Arsdall during cross-examination denied that he was aware of the presence of others. However, during his direct examination, he had testified that he saw numerous other people there during his early evening visit. Tr. X33-35 (Van Arsdall).

by anything voiced by the prosecutor, the jury may have forged and utilized the tenuous inference he has now constructed from a single question. But the federal harmless error standard announced in *Chapman v. California,* 386 U.S. 18, 24 (1967), dictates reversal only where there is a reasonable possibility, not just any possibility, that the error affected the judgment. *Chapman*'s test is not whether one can imagine any scenario where the error may have affected a juror; rather, harmlessness must be judged by what seems to be the probable impact of the error on the minds of the average jury. *Harrington v. California,* 395 U.S. 250, 254 (1969). *See also Schneble v. Florida,* 405 U.S. 427, 432 (1972). Van Arsdall's theory does not meet that standard.

Given the nature of Van Arsdall's defense and his own testimonial concessions, Fleetwood's testimony quickly faded into insignificance. Pet. Br. at 7-15, 35-39. Unless this Court is now willing to require harmlessness to be shown to a degree of certainty not required of even the trier of fact, Respondent's attempts, however valiant, to counter that conclusion are unavailing.[10]

C. The judgment below was based on federal, not independent state law grounds.

Resurrecting an argument relegated to a footnote in his brief opposing the petition for writ of certiorari, Resp.

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[10]In this case, Respondent suggests that given the unresolved question about the propriety of excluding evidence concerning the Blake homicide, any finding of harmlessness may only be advisory. Resp. Br. at 10 n.17. However, Fleetwood's testimony was insignificant because it offered nothing beyond what Van Arsdall himself had conceded. That conclusion would survive even if the court below on remand would find that the inquiry about the Blake homicide was also erroneously prohibited.

Br. Opp. at 18 n. 23, Van Arsdall asserts that this Court should dismiss this case because the automatic reversal rule is based on an independent state law ground. He argues that it was adopted, not as an interpretation of federal constitutional law under *Davis v. Alaska,* 415 U.S. 308 (1974), but as a prophylactic device, announced under the state appellate court's "superintending" authority, to coerce supposedly unmindful and intransigent trial judges to permit liberal cross-examination. Resp. Br. at 37-44.[11]

Even if one accepts as plausible the conclusion that three appellate reversals over a five year period would trigger such a response, the language of the opinion below belies any finding that the court was acting on such an independent state law ground.[12] Though sprinkled liberally with references to the Confrontation Clause and *Davis,* the opinion is devoid of any clear statement indicating that the court was foreclosing federal review by looking to Delaware law as the basis for its decision. *Caldwell v. Mis-*

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[11]Respondent also seems to suggest the decision is unreviewable because the appropriate remedy for federal constitutional error occurring during a state criminal trial is "inherently" a question of state, rather than federal, law. Resp. Br. at 43. In *Chapman v. California,* 386 U.S. 18, 20-21 (1967), this Court rejected that hypothesis, recognizing that the duty to decide whether a right guaranteed by the federal constitution has been denied necessarily encompasses the responsibility to determine, as a matter of federal law, the consequences which flow from a denial of that right. *See also Connecticut v. Johnson,* 460 U.S. 73, 90-91 (1983) (Powell, J., dissenting); *Oregon v. Hass,* 420 U.S. 714, 719 & n.4 (1975).

[12]While the decision below refers to the parallel state Confrontation guarantee, Del. Const. Art. I, § 7 (1897) (Pet. App. at A-4), Van Arsdall does not contend that the automatic reversal rule was seen by the Delaware court as a remedy mandated by the state constitution. Indeed, that court has construed

(Continued on following page)

sissippi, 105 S.Ct. 2633, 2638-39 (1985); *California v. Carney,* 105 S.Ct. 2066, 2068 n.1 (1985); *Ohio v. Johnson,* 104 S.Ct. 2536, 2540 n.7 (1984); *Michigan v. Long,* 463 U.S. 1032, 1040-41 (1983). Indeed, state law is barely mentioned. One searches in vain for a single reference to either the state harmless error rule, Del. Super. Ct. Crim. R. 52(a), or the invocation of any "superintending" authority. Not a single word chastises the trial judge personally, or the trial courts generally, for supposed continued errors which in Van Arsdall's view compelled the state court to impose the drastic remedy of automatic reversal. Instead, after emphasizing that " 'the standards used to determine if there is a violation of the confrontation clause in the first instance are similar, if not identical, to those used in deciding if the error was harmless,' " Pet. App. at A-6 (quoting *Weber v. State,* 457 A.2d 674, 683 (Del. 1983)), the court looks to a federal jurisdiction, the District of Columbia, for a test of harmless error "consistent with *Davis.*" Pet. App. at A-6 to A-7. Any fair reading indicates that the Delaware court was attempting to divine federal law.

Finally, it is now somewhat disingenuous for the Respondent to urge a non-federal foundation for the decision below. The portion of the opinion below articulating the rule of automatic reversal (Pet. App. at A-6 to A-7) repeats, almost verbatim, a portion of his brief to the Delaware Supreme Court. Reply Brief for Appellant (Van

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(Continued from previous page)

the state constitutional provision as mandating the same requirement of an opportunity for cross-examination as the Sixth Amendment. *Ward v. State,* 395 A.2d 367, 368-69 (Del. 1978). *Cf. Delaware v. Prouse,* 440 U.S. 648, 652-53 (1979) (state search and seizure provision interpreted consistent with Fourth Amendment).

Arsdall) at 17-18, *Van Arsdall v. State,* 486 A.2d 1 (Del. 1984). There, he specifically argued that *Davis* utilized and mandated a *per se* error test because a denial of the federally secured right of confrontation was an error affecting a fundamental right which always required reversal. *Id.* at 10-11. Having convinced the court below that automatic reversal was the remedy compelled by the federal constitution, he cannot now insulate that rule from scrutiny by invoking a jurisdictional objection created out of whole cloth.

CONCLUSION

For the reasons stated in Petitioner's opening brief and here, the judgment of the Delaware Supreme Court should be reversed.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an erroneous restriction upon a defendant's opportunity to impeach an adverse witness by showing that he may be biased in favor of the prosecution requires that the defendant's conviction be set aside without any regard to whether the defendant was prejudiced by the error.

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INTEREST OF THE UNITED STATES

The question presented by this case is whether an erroneous restriction upon a defendant's opportunity to impeach a witness by showing that he is biased in favor of the prosecution requires that the defendant's conviction be set aside without any consideration of whether the error was prejudicial. The Court's resolution of this issue will apply equally to federal and state prosecutions.

STATEMENT

Following a jury trial in Kent County, Delaware, Superior Court, respondent was convicted of first degree murder, in violation of Del. Code Ann. tit. 11, § 636(a)(1) (1979), and possession of a deadly weapon during the commission of a murder, in violation of Del. Code Ann. tit. 11, § 1447 (1979 & Supp. 1984). Respondent was sentenced to life imprisonment without the possibility of probation or parole on the murder conviction and to a consecutive 30-year term of imprisonment on the weapons charge (J.A. 2). On respondent's appeal, the Delaware Supreme Court reversed his convictions on the

ground that the trial judge had improperly restricted cross-examination of prosecution witness Robert Fleetwood in contravention of the Confrontation Clause of the Sixth Amendment (Pet. App. A1-A23).

1. Shortly after midnight on January 1, 1982, Doris Epps was stabbed to death in an apartment in Smyrna, Delaware, following a New Year's Eve party. Respondent and Daniel Pregent, the only persons in the apartment with Epps at the time that she was murdered, were arrested at the scene of the crime and were charged with Epps' murder. At separate trials, respondent was convicted and Pregent was acquitted.

a. On December 31, 1981, Pregent and Robert Fleetwood held a joint New Year's Eve party in their adjacent apartments (Pet. App. A2). The party lasted from late morning until shortly before midnight, and more than a dozen guests attended the party on and off during the course of the day (*ibid*; II Tr. 91-94; J.A. 73-80, 121-123). The victim of the murder, Doris Epps, joined the party at roughly 4:00 p.m. and stayed for the remainder of the day (II Tr. 93, 118-119; III Tr. 45, 56; J.A. 78-79, 88).[1] Respondent, an acquaintance of Fleetwood and Pregent (X Tr. 28), stopped briefly at the party during that day (Pet. App. A2; II Tr. 94; J.A. 79-80, 90).

At roughly 11:25 p.m., respondent returned to Pregent's apartment (III Tr. 29-33; X Tr. 18-41). By that time, the party was over. Pregent had quarreled with a female guest and had kicked a hole in a hallway wall (III Tr. 48). Epps had become intoxicated and passed out at about 10:30 p.m., and she was placed on a sofa bed in Pregent's living room (II Tr. 111-113). Afterwards, Pregent got into the bed with Epps, and everyone else left his apartment (II Tr. 107-108). Only Fleetwood, Alice Meinier, and Mark Mood remained in Fleetwood's apartment (III Tr. 49; IV Tr. 8-13; J.A. 95-96).

At approximately 11:30 p.m., a few minutes after respondent had returned to Pregent's apartment, Fleetwood walked across the hall, looked into Pregent's living room from the

[1] December 31 was the final day of Fleetwood's lease and the electricity had been turned off in his apartment (II Tr. 118, 130; III Tr. 52; IV Tr. 43, 50). Epps had briefly visited Fleetwood's apartment earlier that day to inquire about renting it (II Tr. 118, 123; III Tr. 45; J.A. 78-79).

doorway, and saw respondent sitting on the end of a sofa bed next to Pregent's feet (Pet. App. A3; III Tr. 50). Fleetwood, who did not have a complete view of the bed, did not see Epps or anyone else in the apartment; he returned to his own apartment without speaking to respondent or to Pregent (III Tr. 50-52, 66-67; J.A. 82-85). Shortly before midnight, Meinier walked across the hall from Fleetwood's apartment to check the clock in Pregent's kitchen.[2] The kitchen light was on and the clock indicated it was 11:53 p.m. (IV Tr. 14, 51). Meinier immediately returned to Fleetwood's apartment without looking into Pregent's living room, which was dark (IV Tr. 14). Fleetwood fell asleep on his couch a few minutes after nearby church bells had chimed in the New Year, but Meinier and Mood remained awake talking in Fleetwood's apartment (III Tr. 53; J.A. 125-128).

Roughly one hour later, respondent knocked at Fleetwood's door, and Meinier admitted him (IV Tr. 17). Respondent's shirt and hands were splattered with blood, and he was holding a long, blood-covered knife (*id.* at 17-20). Respondent stated that "he had gotten in a fight" but that he "got them back" (*id.* at 19, 61-62). After Mood took the knife from respondent's hand, Meinier suggested that respondent wash his hands in the kitchen sink (*id.* at 21-22). Respondent placed his wrist watch, which was blood soaked and had a piece of human tissue clinging to it, on the counter next to the sink and washed his hands. Respondent then said, "I think there's something wrong across the hall." Meinier went to Pregent's apartment and discovered Epps' body lying in a pool of blood on the kitchen floor. Mood then summoned the police (IV Tr. 65; J.A. 128-134).

The police saw Epps' disemboweled and mutilated body on Pregent's kitchen floor clad only in a sweater and bra. The kitchen floor, appliances, and cabinets were splattered with

[2] Meinier did so because Fleetwood's apartment was without electricity and she had no way of knowing how close it was to the New Year (J.A. 125).

blood and tissue.[3] Blood smears led from the kitchen to Pregent's blood-drenched sofa bed, on which the police found Pregent wrapped in a blanket. The murder weapon, a twelve-inch serrated kitchen knife with a seven and one-half inch blade, and respondent's watch were recovered, respectively, from Fleetwood's sink and from his counter top (IV Tr. 111-115, 122-123, 130-136, 140-141; V Tr. 8; VI Tr. 72). At the scene, respondent, whose clothes and shoes were blood-splattered, explained to the police that he had gotten covered with blood "trying to help the woman" (IV Tr. 84-87). Respondent also stated that he "didn't think it would go like this" (VII Tr. 72). Both respondent and Pregent were arrested.

b. Later that morning at the police station, respondent made a tape-recorded statement (J.A. 10-34). According to his statement, respondent arrived at the party at Pregent's apartment in the late afternoon and left at roughly 6:00 p.m. (J.A. 21-22). After "riding around" with some friends, drinking "[q]uite a bit," and visiting another friend's home outside of town, respondent returned to Pregent's apartment near midnight (J.A. 10, 19, 21-22). He ate a couple of sandwiches, talked with Pregent for a while, and then went to sleep on cushions near Pregent's sofa bed; Pregent got into the sofa bed with Epps (J.A. 12, 22-23, 28-30). Respondent soon felt sick and went into the hall to get some air, noticing nothing unusual in Pregent's apartment (J.A. 11, 14, 22, 30). Shortly thereafter, a woman [*i.e.*, Meinier] stepped out of Fleetwood's apartment and stated that she had heard a noise (J.A. 23, 31). Respondent followed Meinier into Pregent's apartment and found Epps' body on the kitchen floor. Respondent became soaked with Epps' blood when he tried to help Epps, and he washed the blood off his hands in Fleetwood's kitchen sink (J.A. 13-14, 23-24, 26-27, 31). Respondent also claimed that he had lost his Timex watch sometime after 10:30 p.m. on New Year's Eve (J.A. 11, 21); he denied

[3] The medical examiner estimated that Epps died between midnight and 1:00 a.m. (II Tr. 66, 80). Epps had been stabbed or cut 18 times in various parts of her body, including the neck, heart, and vaginal area, and one of the wounds was a two-foot long incision from the top of the sternum to the pelvic area (*id.* at 58-65).

that he had ever held a knife that evening (J.A. 26) or that he had sexual intercourse with anyone the night of the crime (J.A. 18); and he attributed scratches on his arm to his having played that night with Pregent's cat (J.A. 15-16).

In another tape-recorded statement given to the police two days later (J.A. 36-41), respondent retracted most of his earlier statement, explaining that he had lied in order to "cover up for my buddy [Pregent]" (J.A. 36). According to respondent's revised version of the facts, he returned to Pregent's apartment at about 11:30 p.m. (J.A. 37). Pregent lay down on the sofa bed with Epps, and respondent lay down on some adjacent cushions (J.A. 37). After respondent heard noises indicating that Pregent and Epps were engaged in sexual intercourse, respondent fell asleep (J.A. 39-40). Respondent was later awakened by Pregent dragging Epps' body past his feet into the kitchen (J.A. 37, 40). When respondent arose to investigate, Pregent struck him, "daz[ing him] for a while" (J.A. 37). Respondent then saw Pregent repeatedly stab Epps in the kitchen; when respondent tried to pull Pregent away from Epps, Pregent knocked him down (J.A. 37-38). After Pregent ended his attack on Epps, he washed himself off and went back to bed (J.A. 38-39). Respondent then pulled the knife from Epps' body, walked across the hall to Fleetwood's apartment, and told Meinier and Mood that he had been in a fight (J.A. 39).[4]

c. Both of respondent's statements were introduced at trial (VII Tr. 84-85). The State also introduced several types of physical evidence and the testimony of a forensic expert

[4] Pregent also made two tape-recorded statements following his arrest, which were admitted at trial without objection. In essence, Pregent stated that, after talking with respondent and after respondent had "stretched out on some cushions," he [Pregent] fell asleep on the sofa bed next to the fully-clothed Epps. Pregent could not sleep and went to Fleetwood's apartment. When Pregent returned five minutes later, respondent was still awake and "everything was still fine." Pregent then got back into bed with Epps and "the next thing [he] knew," he was awakened and arrested by the police. Pregent claimed that he did not see Epps' body until after he had been taken into custody, and he denied having had sexual intercourse with Epps (J.A. 43-44, 46-47, 52-53, 56).

(*e.g.*, VI Tr. 23-109). According to this expert, the blood found on the knife and watch recovered from Fleetwood's apartment, as well as the blood staining the clothes that respondent was wearing when he was arrested, matched Epps' blood type (VI Tr. 34-49, 56-60, 72, 107-108; IX Tr. 12-13, 16).[5] In addition, fibers matching the fibers of Epps' sweater and one "Negro" pubic hair, like that of Epps, were found on respondent's jockey shorts (VI Tr. 4-42, 54).[6]

d. The prosecution called Robert Fleetwood as a witness. In his direct testimony, Fleetwood recounted uncontroverted facts regarding the party and respondent's presence at Pregent's apartment the afternoon of New Year's Eve and again later that night an hour or so before Epps was killed (III Tr. 40-54). In all significant respects, Fleetwood's testimony was corroborated by other witnesses, including respondent, whose own testimony placed him at Pregent's apartment at about the same times that Fleetwood placed him there (II Tr. 94; X Tr. 29, 33; J.A. 140-142).

Near the end of Fleetwood's cross-examination, defense counsel sought to impeach Fleetwood by questioning him about the dismissal of a misdemeanor charge against him—being drunk on a highway—after he had agreed to speak with the prosecutor about Epps' murder (III Tr. 69). When the prosecutor objected to that inquiry on relevancy grounds, the trial court allowed counsel to voir dire Fleetwood on the matter (*id.* at 70-88). Fleetwood acknowledged that the drunkenness charge was dropped in exchange for his promise to speak with the prosecutor regarding Epps' murder, but he

[5] The pants Pregent was wearing when he was arrested were stained with blood on the bottom of both legs, indicating that he had stepped into a large pool of blood (VI Tr. 54-65, 109). A T-shirt recovered from a water-filled trash can in Pregent's bathroom had a "very little bloodstain" that was "smeared and diluted"; a towel and a pair of socks also found in the trash can had no blood on them (VI Tr. 65-67; VII Tr. 43; IX 37-38).

[6] Based on the physical evidence and photographs of the crime scene, the forensic expert concluded that Epps had initially been stabbed in Pregent's living room next to the sofa bed, that she then fell or was placed o.. the sofa bed and later dragged by her shoulders into Pregent's kitchen, where additional wounds were inflicted (VI Tr. 89-96). Epps' pants and panties had been removed before she was assaulted (*id.* at 105).

denied that the agreement had an effect on his testimony (*id.* at 75-76; J.A. 100-107).[7] The trial court disallowed any cross-examination about that agreement (III Tr. 82; J.A. 110) and also refused to permit defense counsel to cross-examine Fleetwood about his being questioned by the police in connection with an unrelated homicide that had occurred after Epps' murder (III Tr. 83-88; J.A. 111-115).[8]

e. Respondent was the only defense witness. As in his second statement to the police, respondent attributed Epps' murder to Pregent (X Tr. 17-90). Respondent admitted that he had visited the party twice during the day and that he returned shortly before midnight.[9] Once there, respondent ate, talked with Pregent, and played with Pregent's cat (X Tr. 43-47). After Pregent left the living room, respondent had sexual intercourse with Epps on the sofa bed at her invitation.[10] Afterwards, Pregent lay down on the bed with Epps, and respondent reclined on some nearby cushions (*id.* at 47-49). Before he fell asleep, respondent heard Pregent and Epps engaged in sexual intercourse (*id.* at 49-50). Respondent's sleep was interrupted by Pregent dragging Epps's limp body past respondent's feet (*id.* at 50-51). When respondent asked Pregent what was going on, Pregent struck him (*id.* at 51). Respondent then saw "dark stuff" on the floor,

[7] Fleetwood stated that on the night of the crime he gave a statement to the police that was basically identical to his trial testimony (J.A. 105).

[8] Additional voir dire was conducted regarding the unrelated homicide; Fleetwood denied that he had been offered any favors, inducement, promises, or deals with respect to that homicide in exchange for his testimony at respondent's trial (III Tr. 85-86; J.A. 113-114).

[9] Respondent testified that he had known Fleetwood and Pregent for a few years and that Pregent had invited him to the party when they met on the street on the afternoon of December 31, 1981 (X Tr. 26). Respondent went to Pregent's apartment, met Epps for the first time, and left after 30 minutes (*id.* at 28-31). Later that afternoon, respondent returned to the party, but left a short time later (*id.* at 33-35). After spending the remainder of the afternoon and evening drinking with friends, respondent returned to Pregent's apartment (*id.* at 35-41; J.A. 140-142).

[10] No seminal fluid was found on any item of Epps' clothing or on any other item that was analyzed by the government's forensic expert (VI Tr. 42). The medical examiner did not state, however, whether any fluid was found on Epps (II Tr. 52-88).

put on his shoes because the floor "was wet," and walked to the doorway of the kitchen (*id.* at 51-52). Respondent saw Pregent squatting over Epps in the kitchen, stabbing and cutting her (*id.* at 52-53). Respondent grabbed Pregent, but was knocked down (*id.* at 53-54).[11] The next thing respondent remembered was seeing Pregent exit the utility room of the apartment (*id. at* 54). When Pregent walked back to the living room, respondent pulled the knife from Epps' body—to protect himself from Pregent, respondent claimed (*id.* at 56, 70-71)—and went to Fleetwood's apartment to get help (*id.* at 57-58). After washing the blood off his hands in Fleetwood's kitchen sink (*id.* at 59), respondent and Meinier went to Pregent's apartment, and respondent checked Epps's wrist for a pulse (*id.* at 60-61). Finding none, they returned to Fleetwood's apartment and tried unsuccessfully to wake up Fleetwood (*id.* at 61-62).

Defense counsel admitted in their opening and closing arguments to the jury that respondent was present at Pregent's apartment when Epps was killed (J.A. 62, 64-65, 181, 188-189, 192-194).[12] In closing argument, defense counsel also said that none of the five prosecution witnesses who were present that night, including Fleetwood, "testified to any fact suggesting anything other than that [respondent] was in that apartment" (J.A. 189).

2. On appeal to the Delaware Supreme Court, respondent argued that the trial court had erroneously denied him the right to establish Fleetwood's bias by limiting his cross-

[11] One of the arresting officers testified that he saw no bruises on respondent (X Tr. 95).

[12] For example, counsel told the jury in closing argument (XI Tr. 32, 42; J.A. 181, 188-189):

> The defense does not dispute that [respondent] was in Daniel Pregent's apartment and [respondent] was there when the murder occurred. There is no dispute about that.
>
> * * * * *
>
> [Fleetwood's testimony] proves what [respondent] has never denied. It proves what [respondent] has already testified to in this trial. It proves that [respondent] was at Danny Pregent's apartment before Doris Epps was murdered.

examination. Relying in part upon *Davis* v. *Alaska*, 415 U.S. 308 (1974), the court reversed respondent's convictions on the ground that the trial judge's ruling barring any cross-examination of Fleetwood regarding the dismissal of the misdemeanor charge violated the Confrontation Clause by keeping from the jury facts regarding bias that were central to assessing Fleetwood's credibility. Pet. App. A5-A6.[13] In so doing, it rejected the State's argument that, since "Fleetwood's basic testimony was cumulative in nature and unimportant," the Confrontation Clause error was harmless beyond a reasonable doubt (Pet. App. A6). The court held that "a blanket prohibition against exploring potential bias through cross-examination" is "a per se error," that "the actual prejudicial impact of such an error is not examined," and that "reversal is mandated" (*id.* at A7).

SUMMARY OF ARGUMENT

It is a basic principle of modern American law—applicable equally to criminal as to civil cases, and to both constitutional and non-constitutional claims—that an appellant is not entitled to a reversal of the trial court's judgment unless he can show not only the existence of an error, but also some likelihood that the error was prejudicial to him (*i.e.*, that it was not "harmless"). It is therefore customary for appellate courts to reverse only upon finding a sufficient probability that the result would have been different but for the error. In this case, however, the Delaware Supreme Court held that this principle may not be applied where there has been an erroneous restriction of the defendant's right to show that a prosecution witness is biased, on the ground that the Sixth Amendment prohibits affirmance of a conviction in such circumstances even if it can be demonstrated that the restriction on cross-examination could not have affected the outcome of the trial.

[13] The court left open the question whether denying respondent an opportunity to cross-examine Fleetwood about the unrelated homicide investigation was also erroneous. Pet. App. A6 n.3.

It is of course true that certain errors will always require reversal without separately considering whether a likely effect on the verdict has been demonstrated. For example, a trial before a biased tribunal, the denial of counsel, or the denial of a jury trial can never be "harmless," despite indisputable proof of the defendant's guilt, because the proceeding at which he was convicted lacked the fundamental attributes of a trial as we know it. Or, to consider a somewhat different class of cases, harmless error analysis would be pointless where the standard for determining whether there was any error at all already turns in part on a finding of prejudice, as in *Brady* claims. Finally, there may be instance in which prejudice is presumed (and harmless error inquiry thus foreclosed) because of the violation of an important right designed to protect the defendant against an unjust conviction in circumstances in which is it impossible to determine the actual or probable effect of the error.

Denying a defendant the opportunity to impeach an adverse witness does not fit into any of those limited categories of errors requiring automatic reversal. Confrontation by means of impeachment is valued not as an end in itself, but as a means to the end of enhancing the reliability of the verdict. It is thus entirely appropriate, upon finding an improper restriction on impeachment of an adverse witness, to determine whether successful impeachment of the witness's credibility might have affected the verdict. That inquiry is not inherently impracticable. Whether an error of this type is prejudicial hinges upon a variety of factors—such as the nature of the testimony that the witness has given, the nature and strength of the alleged bias, and the defense offered at trial—which will necessarily vary from case to case. Moreover, because impeachment is simply one of several means to an end, denying a defendant the opportunity to impeach a witness does not invariably deprive the accused of the benefits of confrontation. Finally, as was the case here, the testimony given by a particular witness may be so insignificant or may be so indisputably accurate in light of other, corroborating evidence that the denial of an opportunity to impeach that witness cannot reasonably be said to have deprived the defendant of a fair opportunity to establish his innocence.

ARGUMENT

THE ERRONEOUS RESTRICTION OF A DEFENDANT'S OPPORTUNITY TO DEMONSTRATE BIAS ON THE PART OF A PROSECUTION WITNESS DOES NOT REQUIRE AUTOMATIC REVERSAL WITHOUT REGARD TO PREJUDICE

We have no quarrel with the ruling by the court below that, once the State chose to call Robert Fleetwood as a witness, respondent should have been allowed to impeach him by bringing out the fact that Fleetwood's cooperation may have been induced by the dismissal of his pending misdemeanor charge. Nevertheless, we think it indisputable that this error could not possibly have affected the jury's verdict in light of the marginal significance of the facts to which Fleetwood testified and their corroboration in all material respects by the testimony of other witnesses, including the state's forensic expert, by physical evidence, and by respondent's own statements to the police and his trial testimony.[14] See pages 4-8, *supra*. The Delaware Supreme Court did not suggest otherwise, but instead declined to consider whether the error may have been prejudicial. Relying upon *Davis* v. *Alaska*, 415 U.S. 308 (1974), it concluded that the Constitution requires automatic reversal whenever a defendant is improperly precluded from bringing out the possible bias of a prosecution witness. This holding, which conflicts with the majority of federal and state court rulings on the subject, is wrong.[15]

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[14] Given respondent's admissions to the police and defense counsel's statements at trial (see pages 4-5, 8, *supra*), respondent cannot claim that his trial testimony was in any way the "fruit" of the restriction on cross-examination. Cf. *Harrison* v. *United States*, 392 U.S. 219 (1968).

[15] Since *Davis* was decided, most federal and state courts have held that an erroneous restriction on a defendant's opportunity to cross-examine an adverse witness can be harmless. See, *e.g.*, *United States* v. *Garza*, 754 F.2d 1202, 1206-1208 (5th Cir. 1985); *United States* v. *Smith*, 748 F.2d 1091, 1096 (6th Cir. 1984); *Carrillo* v. *Perkins*, 723 F.2d 1165, 1170-1173 (5th Cir. 1984); *United States* v. *Whitt*, 718 F.2d 1494, 1501-1502 (10th Cir. 1983); *United States ex rel. Scarpelli* v. *George*, 687 F.2d 1012, 1013-1014 (7th Cir. 1982), cert. denied, 459 U.S. 1171 (1983); *Kines* v. *Butterworth*,

A. It is well settled that the Constitution does not guarantee a defendant a perfect trial and that not every error that occurs prior to or at trial requires that the defendant's conviction be set aside as the remedy. That uncontroversial principle recognizes that "[a]bsent [an actual or threatened adverse] impact on the criminal proceeding, * * * there is no basis for imposing a remedy in that proceeding" (*United States* v. *Morrison*, 449 U.S. 361, 365 (1981)) as well as that " ' remedies should be tailored to the injury suffered . . . and should not unnecessarily infringe on competing interests' " (*Rushen* v. *Spain*, 464 U.S. 114, 118 (1983) (quoting *Morrison*, 449 U.S. at 364)). The harmless error doctrine, as it has come to be known, is merely one application of this principle.

In *Chapman* v. *California*, 386 U.S. 18 (1967), the Court rejected the argument that all federal constitutional errors, regardless of their nature or severity or the strength of the government's proof of the defendant's guilt, must be deemed

669 F.2d 6, 11-13 (1st Cir. 1981), cert. denied, 456 U.S. 980 (1982); *United States* v. *Gambler*, 662 F.2d 834, 840-842 (D.C. Cir. 1981); *United States* v. *Duhart*, 511 F.2d 7, 9-10 (6th Cir.), cert. dismissed, 421 U.S. 1006 (1975); *Snyder* v. *Coiner*, 510 F.2d 224, 227-229 (4th Cir. 1975); *Ransey* v. *State*, 680 P.2d 596, 597-598 (Nev. 1984); *State* v. *Patterson*, 656 P.2d 438, 439 (Utah 1982); *State* v. *Pierce*, 64 Ohio St.2d 281, 414 N.E.2d 1038, 1043-1044 (1980); cf. *Commonwealth* v. *Wilson*, 381 Mass. 90, 407 N.E.2d 1229, 1247 (1980). Contra, *State* v. *Parillo*, 480 A.2d 1349, 1357-1358 (R.I. 1984). The Ninth Circuit is in disarray on this issue. Compare *United States* v. *Uramoto*, 638 F.2d 84, 87 (9th Cir. 1980) (stating that such errors cannot be harmless; witness in that case was crucial, however), with *United States* v. *Price*, 577 F.2d 1356, 1362-1364 (9th Cir. 1978), cert. denied, 439 U.S. 1068 (1979) (such errors can be harmless); *Patterson* v. *McCarthy*, 581 F.2d 220, 221-222 (9th Cir. 1978) (finding that error was not harmless in that case). See also *United States* v. *Jackson*, 756 F.2d 703, 706 (9th Cir. 1985) (per se rule of reversal stated in *Uramoto* may be limited to denial of cross examination that is prejudicial); *United States* v. *Williams*, 668 F.2d 1064, 1070 & n.14 (9th Cir. 1981) (noting "disharmony in this circuit surrounding that issue"; reversing on ground that restriction was prejudicial); *Chipman* v. *Mercer*, 628 F.2d 528, 533 (9th Cir. 1980) (erroneous restriction on cross-examination cannot be harmless because defendant must show that the verdict was adversely affected by the restriction to establish a Confrontation Clause violation).

inherently prejudicial, requiring reversal of a judgment of conviction. The Court reasoned that in the context of a particular case a given error may have had little, if any, likelihood of skewing the factfinding process at trial and that where a reviewing court may confidently say that no such effect occurred, the reversal of a conviction provides an unjustified windfall for the defendant. 386 U.S. at 21-24; see *United States* v. *Hasting*, 461 U.S. 499, 508-509 (1983).[16] Since *Chapman*, the Court has repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the constitutional error that occurred before or during trial was harmless.[17] Indeed, in *Hasting* the Court made clear that "it is the *duty* of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless." 461 U.S. at 509 (emphasis added); see also 28 U.S.C. 2111; Fed. R. Crim. P. 52(a).

The harmless error doctrine furthers several fundamental interests in the administration of criminal justice. It gives effect to the principle that the essential purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence (*United States* v. *Nobles*, 422 U.S. 225, 230 (1975)), rather than merely to deliver a preliminary answer to

[16] As the Court explained in *Hasting*, the harmless error doctrine recognizes that, "given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial." 461 U.S. at 508-509.

[17] See, *e.g.*, *Rushen* v. *Spain*, *supra* (right to be present at trial); *United States* v. *Hasting*, *supra* (improper comment on defendant's silence at trial, in violation of Self-Incrimination Clause); *Hopper* v. *Evans*, 456 U.S. 605, 613-614 (1982) (statute improperly forbidding court from giving a jury instruction on a lesser included offense in a capital case, in violation of Due Process Clause); *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977) (admission of identification in violation of Sixth Amendment Counsel Clause); *Brown* v. *United States*, 411 U.S. 223, 231-232 (1973) (admission of out-of-court statement in violation of Sixth Amendment Confrontation Clause); *Milton* v. *Wainwright*, 407 U.S. 371 (1972) (admission of confession in violation of Sixth Amendment Counsel Clause); *Chambers* v. *Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of Fourth Amendment); *Coleman* v. *Alabama*, 399 U.S. 1 (1970) (denial of right to counsel at a preliminary hearing in violation of Sixth Amendment Counsel Clause).

allegedly more important abstract legal questions that will ultimately be resolved on appeal (cf. *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977)). It also ensures that the criminal process is not treated as a "game" by removing incentives for defense counsel to attempt to sow technical errors at trial for the sole purpose of obtaining a reversal on appeal. See *Kotteakos* v. *United States*, 328 U.S. 750, 759 (1946). It promotes public respect for the criminal process by focusing on the underlying fairness of the trial, rather than on immaterial technicalities. See *Hasting*, 461 U.S. at 509; *Kotteakos*, 328 U.S. at 759-760; R. Traynor, *The Riddle of Harmless Error* 14, 50 (1970). The doctrine also contributes to the finality that is essential if punishment is to serve its intended purpose. Cf. *Sanders* v. *United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting). Finally, it conserves scarce trial resources by eliminating burdensome retrials where correction of the error is not likely to improve the reliability of the verdict, but may instead inject new errors. See *Hasting*, 461 U.S. at 509. In essence, by eliminating needless retrials where it can be confidently said that no materially prejudicial error occurred at trial, the harmless error doctrine allows an appellate court "to keep the balance true" (*Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934)) between the government's interest in convicting the guilty and a defendant's interest in avoiding an unjust conviction. See *Hasting*, 461 U.S. at 509; cf. *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 24.

At the same time, the Court has recognized that some constitutional rights are so essential to a fair trial that their violation warrants reversal in every case. *Chapman* itself gave three examples of such infractions. 386 U.S. at 23 n.8. Two of them—compelling a defendant to stand trial before a trier of fact with a financial interest in the outcome (see *Tumey* v. *Ohio*, 273 U.S. 510 (1927)) and denying a defendant the assistance of counsel at trial (see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963))—strike at the heart of the modern concept of a criminal trial. Their deprivation is properly viewed as functionally equivalent to the denial of any trial at all. Cf. *Drope* v. *Missouri*, 420 U.S. 162, 171 (1975) (forcing a

mentally-incompetent defendant to stand trial); *Moore* v. *Dempsey*, 261 U.S. 86, 91 (1923) (mob dominated trial).[18] The third error listed in *Chapman*—introducing a coerced confession (see *Payne* v. *Arkansas*, 356 U.S. 560 (1958))—is likely to call into question the reliability of the verdict in a manner that is is not susceptible to effective appellate review.[19] An error like this necessarily undermines an appellate court's confidence in the accuracy of the verdict. Cf. *Strickland*, slip op. 24.

The final category of errors that, once found to have occurred, will not be separately analyzed for harmlessness is defined in an entirely different manner. This class consists of

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[18] Analogous errors or deprivations that would appear to require reversal without regard to their specific impact upon the defendant's trial include denying the defendant a jury trial, trying a defendant in absentia, or refusing to permit the defendant to testify. Whether a jury charge that shifts the burden of proof on, or conclusively presumes, the issue of the defendant's intent fits into this category hinges upon whether such a charge amounts to a directed verdict of guilty. Compare *Connecticut* v. *Johnson*, 460 U.S. 73, 84-88 (1983) (plurality opinion), with *id.* at 94-102 (Powell, J., dissenting). The right to represent oneself at trial (see *Faretta* v. *California*, 422 U.S. 806 (1975)) may also fit into this category, since it is an integral component of the defendant's right to present a defense at trial (*id.* at 818-821), or it may be in a class by itself, because the right exists, in part at least, "to affirm the dignity and autonomy of the accused" (*McKaskle* v. *Wiggins*, No. 82-1135 (Jan. 23, 1984), slip op. 7; *id.* at 9; *id.* at 11 n.6 (White, J., dissenting)).

[19] As Justice Harlan put it in *Chapman*, "particular types of errors have an effect which is so devastating or inherently indeterminate that as a matter of law they cannot reasonably be found harmless." 386 U.S. at 52 n.7 (dissenting opinion). However, given the Court's subsequent decisions in *Harrington* v. *California*, 395 U.S. 250 (1969), and *Milton* v. *Wainwright*, *supra*, it is presently unclear whether the admission of a coerced confession still fits into the class of errors that cannot be harmless.

Justice Harlan also suggested that "certain types of official misbehavior" should warrant reversal in every case to indicate society's disapproval of "such intentional misconduct." 386 U.S. at 52 n.7 (dissenting opinion). However, the Court rejected that approach to the harmless error doctrine in *Hasting*. See 461 U.S. at 507 ("the interests preserved by the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise what the court viewed as prosecutorial overreaching"); see also *Mabry* v. *Johnson*, No. 83-328 (June 11, 1984), slip op. 6; *Smith* v. *Phillips*, 455 U.S. 209, 219 (1982).

those matters as to which prejudice is considered in the determination whether there has been an error. See, *e.g.*, *United States* v. *Bagley*, No. 84-48 (July 2, 1985), slip op. 10-15 (*Brady* claims); *Strickland*, slip op. 21-26 (ineffective assistance of counsel); *United States* v. *MacDonald*, 435 U.S. 850, 858 (1978) (speedy trial claims); cf. *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 15 n.14 (plain error under Fed. R. Crim. P. 52(b)). The reason that such claims cannot be harmless, of course, is that it is pointless to undertake a separate inquiry into whether an error had an effect upon the outcome of the trial if the defendant has already established that the error was prejudicial in demonstrating its existence.[20]

B. The question in this case is how the error at respondent's trial should be classified. In ruling that this error could not be harmless, the Delaware Supreme Court did not suggest that it could be classified among those constitutional violations that so far deny a defendant the essentials of a trial as to preclude a valid conviction without regard to the reliability of the verdict. That argument also could not be seriously entertained; perhaps a blanket refusal to permit cross-examination of all prosecution witnesses could rationally be treated like a deprivation of counsel or trial before a biased tribunal, but an erroneous restriction upon defense cross-examination of a particular witness simply cannot be equated with denial of a meaningful trial. Nor can the right to impeach a prosecution witness be compared with something like the right to represent oneself at trial, which is a right wholly unrelated to the reliability of the verdict. The purpose of the Confrontation Clause is to enhance the reliability of the factfinding process at trial, not to recognize the dignity and

[20] While a showing of prejudice is not an absolute prerequisite to establishing a speedy trial violation (see *Barker* v. *Wingo*, 407 U.S. 514, 530-533 (1972)), because consideration of prejudice nonetheless plays a central role in evaluating the claim, this too is a category of cases in which it is fair to say that the harmless error principle has in effect been folded into the decision whether there was an error.

autonomy of the accused. See, *e.g.*, *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 6; *Ohio* v. *Roberts*, 448 U.S. 56, 63-64 (1980).

In determining that the Confrontation Clause was violated, the Delaware Supreme Court did not require respondent to demonstrate that the restriction actually and materially prejudiced his defense.[21] This case therefore also does not fit into the category in which any error that occurs cannot be harmless because prejudice has already been found in determining that an error existed.

Because the purpose of the Sixth Amendment is to ensure that a defendant receives a fair trial, there is generally no reason to award a defendant relief based upon a Sixth Amendment claim absent a showing of a likely adverse effect upon the reliability of the trial process. See *United States* v. *Cronic*, No. 82-660 (May 14, 1984), slip op. 9-10; *Morrison*, 449 U.S. at 364-365.[22] Ordinarily, this means that only those

[21] Although the court stated that "[t]he question of bias was an important issue before the [trial] court and the excluded evidence was central to that issue" (Pet. App. A5-A6 (footnote omitted)), the court did not suggest that the error was likely to have adversely affected the verdict, which is an essential aspect of either a determination of prejudice or harmless error analysis. Compare, *e.g.*, *Strickland*, slip op. 29-30, with *Hasting*, 461 U.S. at 512.

[22] In several contexts, the Court has ruled that a showing of prejudice is necessary before there is a Sixth Amendment violation or before a defendant can obtain relief. See, *e.g.*, *Strickland*, slip op. 21 (ineffective assistance of counsel); *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 872-874 (1982) (claimed violation of Compulsory Process Clause based upon deportation of potential witness); *United States* v. *MacDonald*, 435 U.S. 850, 858-859 (1978) (prejudice important in showing a violation of Speedy Trial Clause); *Weatherford* v. *Bursey*, 429 U.S. 545 (1977) (prejudice necessary to establish a violation of Counsel Clause by using co-defendant as government informant); see also *Morrison*, 449 U.S. at 364-365 (general rule is that an error does not warrant setting aside a conviction absent a demonstrable effect upon the outcome of the trial); see generally *Cronic*, slip op. 9-10 ("we begin by recognizing that the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of the challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated"). The same principle also applies in a variety of other contexts. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783 (1977) (proof of actual prejudice required to establish a due process violation arising from pre-indictment delay).

errors that may have produced an inaccurate guilty verdict in the case at hand require that a defendant receive a new trial. See, *e.g.*, *Strickland*, slip op. 21-26.[23] The decisions of this Court leave open the possibility that a showing of actual prejudice from an erroneous restriction on cross-examination is intrinsic to finding a Confrontation Clause violation in the first place.[24] Indeed, a substantial argument, supported by the mode of analysis employed in *Davis* v. *Alaska*, can be presented in favor of that rule.[25]

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[23] That is not always the case, however; denial of a jury trial would not be harmless despite irrefutable proof of a defendant's guilt. The purposes of each particular Sixth Amendment guarantee must be examined to make this determination. The severity of the deprivation may also be pertinent. A complete denial of counsel requires automatic reversal without any showing of particularized prejudice (*Gideon* v. *Wainwright*, 372 U.S. 335 (1963)), whereas claims that particular acts or omissions of counsel deprived the defendant of his Sixth Amendment rights are evaluated with specific reference to potential prejudice (*Strickland*, slip op. 21-23; *Cronic*, slip op. 11 n.26).

[24] The Court's decisions involving a direct restriction on a defendant's cross-examination have involved situations in which either the witness gave particularly incriminating testimony or the defendant was denied the opportunity to elicit especially favorable exculpatory evidence. See, *e.g.*, *Davis* v. *Alaska*, 415 U.S. at 310-314, 317-318; *Chambers* v. *Mississippi*, 410 U.S. 284, 291-293 (1973); *Smith* v. *Illinois*, 390 U.S. 129, 130 (1968); *Brookhart* v. *Janis*, 384 U.S. 1, 2-4 (1966). Similarly, the Court's decisions regarding the admission of statements, such as a confession or prior testimony, made by a declarant not subject to cross-examination at trial have also involved highly damaging evidence. See, *e.g.*, *Barber* v. *Page*, 390 U.S. 719, 720 (1968); *Brookhart* v. *Janis*, 384 U.S. at 2, 4; *Douglas* v. *Alabama*, 380 U.S. 415, 416-417, 419 (1965); *Pointer* v. *Texas*, 380 U.S. 400, 403 (1965). Some older cases not involving the Confrontation Clause either state or suggest that the denial of an opportunity for effective cross-examination will itself be treated as prejudicial. See, *e.g.*, *Alford* v. *United States*, 282 U.S. 687, 692 (1931); *Tla-Koo-Yel-Lee* v. *United States*, 167 U.S. 274, 277-278 (1897). But, in these cases as well, the witness involved gave damaging testimony against the accused, and the defense had a strong reason for pursing a particular line of inquiry. In any event, even if these decisions are read to suggest that a defendant need not show that the restriction might have affected the verdict to establish a confrontation violation, that would not foreclose application of the harmless error doctrine.

[25] A parallel could be drawn to the different rules governing cases like *Gideon*, *Powell* v. *Alabama*, 287 U.S. 45 (1932), and *Strickland*. There, the

Respondent's conviction was reversed without regard to the existence of case-specific prejudice arising from the restriction upon his cross-examination of Fleetwood. There is accordingly no need to decide in this case whether, if prejudice must in fact be shown in order to justify reversal, that is because prejudice is an element of the finding of error itself or because it is the criterion for deciding whether the error requires reversal.[26] Rather, the question here is whether a non-prejudicial restriction on cross-examination compels reversal. The affirmative answer of the Delaware Supreme Court would be correct only if this type of error is so inherently prejudicial and so indeterminate that it necessarily undermines an appellate court's confidence in the reliability of the verdict and prevents the court from effectively determining whether the error had an adverse effect on the trial. For the following reasons, we believe that the denial of an opportunity to impeach a prosecution witness regarding bias does not fit into this category.

1. The Delaware Supreme Court relied in part on *Davis* v. *Alaska*, *supra*, for its holding that this error was prejudicial per se. Pet. App. A6. Properly read, however, *Davis* does not stand for the proposition that an erroneous restriction on

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question whether prejudice would be presumed hinged upon the degree of the interference with the right to counsel; here, the question would turn upon the degree of interference with a defendant's opportunity to confront adverse witnesses. The complete denial of any opportunity to cross-examine any adverse witness would be conclusively presumed to result in prejudice. See *Brookhart*, 384 U.S. at 3. Prejudice would be presumed where a defendant was denied the opportunity, in truth or effect, to cross-examine a crucial adverse witness. See *Davis* v. *Alaska*, *supra*; *Smith* v. *Illinois*, *supra*; *Alford* v. *United States*, *supra*. Finally, the denial of any opportunity to cross-examine a minor witness (*e.g.*, one who gave cumulative or undisputed testimony) or a particular restriction upon cross-examination of a more important witness would call for a case-specific inquiry into potential prejudice. This case would appear to fit into the third category.

[26] This point could be of significance if the outcome of the case depended upon an allocation of the burden of proof, since the prosecution would likely be allocated the burden of showing harmless error. Here, the State's effort to assume that burden was rejected by the court below on the ground that a showing of harmlessness would not avoid reversal.

defense cross-examination or impeachment invariably requires reversal and does not preclude application of the harmless error doctrine in this case.

Davis is best understood in light of its facts. Davis was charged with burglary and grand larceny for the theft of a safe from a bar. The police found the safe that Davis had allegedly stolen abandoned near Richard Green's home, and Green, the only eyewitness, testified that he had seen Davis near this site on the day of the crime. The defense was forbidden from eliciting on cross-examination of Green that he was on juvenile probation for burglary both at the time of the offense charged against Davis and at the time of the trial. The defense sought to reveal this fact to impeach Green for bias by showing that he may have slanted his testimony in the State's favor to shift suspicion away from himself or to avoid revocation of his probation for not "cooperating" with the prosecutor. 415 U.S. at 310-311. The trial judge, relying upon state rules forbidding the disclosure of juvenile records in judicial proceedings, prohibited questioning that would disclose Green's juvenile record. *Id.* at 311.

This Court reversed Davis's conviction. It explained that the opportunity to impeach a prosecution witness by showing that he is biased against the defendant is an integral component of confrontation. 415 U.S. at 315-317. Emphasizing the importance of Green's testimony to the prosecution's case and relying upon *Alford* v. *United States*, 282 U.S. 687 (1931), which had upheld a defendant's right to disclose that a witness was being detained in custody at the time of trial and thus may have been eager to "cooperate" with the government in order to have his own charges dropped or reduced, the Court held that denying Davis any opportunity to reveal that Green was on probation required that Davis's conviction be set aside. 415 U.S. at 317-318, 320-321. As the Court concluded, "[Davis] was thus denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' " 415 U.S. at 318 (quoting *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968), quoting in turn *Brookhart* v. *Janis*, 384 U.S. 1, 3, (1966)).

In so ruling, however, *Davis* did not except from the operation of the harmless error rule all cases in which a defendant is denied an opportunity to impeach a witness for bias. In the first place, *Davis* did not cite, much less distinguish, *Chapman* or any of the Court's other harmless error decisions. Nor did *Davis* explain why an erroneous limitation upon the extent of defense cross-examination should be treated differently from a complete denial of *any* opportunity to cross-examine an adverse witness, which the Court had previously held could be harmless in an appropriate case. See pages 22-24, *infra*. In short, *Davis* can hardly be read to have rejected the application of a well established doctrine that the Court never discussed.[27]

This is especially so since the dictum in *Davis* came only after the Court had painstakingly demonstrated how Davis had in fact been prejudiced. The Court repeatedly stressed the pivotal nature of Green's testimony and the fact that any substantial blow to his credibility would have been fatal to the state's case. Not only was "Green * * * a crucial witness for the prosecution" (415 U.S. at 310), but also "Green's testimony * * * provided 'a crucial link in the proof . . . of [Davis'] act' " (*id.* at 317 (citation omitted); see *id.* at 319). Moreover, given the fact that the proof of Davis's guilt otherwise rested entirely upon circumstantial evidence (*id.* at 310), "[t]he accuracy and truthfulness of Green's testimony were key elements in the State's case against [Davis]" (*id.* at 317). For that reason, the Court observed that "[s]erious damage to the strength of the State's case would have been a real possibility

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[27] Neither of the cases cited by *Davis* ruled that an erroneous restriction on defense cross-examination cannot be harmless. In *Brookhart*, the defendant was denied the opportunity to cross-examine any of the state's witnesses, and the state offered a confession by an absent witness. The only question was whether the defendant had waived his confrontation right. 384 U.S. at 4-8. In *Smith*, the defendant was denied the right to ask the crucial witness for the state his name and address; that witness's testimony was pivotal because the only issue at trial was the relative credibility of the witness and the defendant. 390 U.S. at 130. In both cases, the error was presumed to be prejudicial; in neither case did the Court discuss whether erroneous restrictions on cross-examination could be harmless in other contexts.

had petitioner been allowed to [impeach Green]." *Id.* at 319. Finally, the Court observed that there was a strong possibility that Green had chosen to rely upon the trial court's ruling that his juvenile records could not be disclosed as a means of giving testimony that "can be regarded as highly suspect at the very least" (*id.* at 314; see *id.* at 313-314).[28] Accordingly, even read with liberality, *Davis* simply holds that the Confrontation Clause entitles a defendant to disclose a known bias on the part of an adverse witness and that denying Davis any such opportunity was prejudicial to his defense.

2. The Court's decisions clearly support the proposition that a Confrontation Clause violation like the one that occurred here can be harmless in an appropriate case. Indeed, that principle was first articulated more than 80 years ago in *Motes* v. *United States*, 178 U.S. 458 (1900). There, the government introduced at trial against all of the co-defendants a transcript of the testimony given at a preliminary hearing by a witness whom the government had allowed to escape from custody prior to trial. The admission of this statement, the Court held, denied each defendant the opportunity to cross-examine the declarant, in violation of the Confrontation Clause, requiring reversal of the convictions of all but one co-defendant. 178 U.S. at 471-474. Reversal of that defendant's conviction was unwarranted, however, because he had testified at trial that he was solely responsible for the crime. *Id.* at 474-475. Given his sworn admission of his guilt, the Court held that "[i]t would be trifling with the administration of the criminal law to award him a new trial" (*id.* at 476).

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[28] During cross-examination of Green, the defense elicited the fact that Green had been questioned by the police regarding the burglary of the bar. 415 U.S. at 312-313. However, Green denied that he had ever before been subject to a similar interrogation. *Id.* at 313. The trial court cut off any further questioning along this line on the basis of its pretrial ruling regarding the admissibility of Green's juvenile records. *Ibid.* This Court noted that, given the likelihood that Green had been questioned in some manner in connection with his arrest for the burglaries on which Green had been adjudged a juvenile delinquent, "it is doubtful whether the bold 'No' answer would have been given by Green absent a belief that he was shielded from traditional cross-examination" (*id.* at 314).

More recently, the Court has reaffirmed that principle in a series of cases holding that the admission of a confession made by a nontestifying co-defendant, in violation of *Bruton* v. *United States*, 391 U.S. 123 (1968), can be harmless. *Bruton* held that the receipt in evidence at a joint trial of a confession made by a nontestifying co-defendant that incriminated Bruton but was inadmissible as to him deprived Bruton of the right to cross-examine an adverse witness. However, despite the fact that admission of such potentially unreliable evidence could have a "devastating" effect (391 U.S. at 136), constitutes a " 'serious flaw[ ] in the fact-finding process at trial' " (*Roberts* v. *Russell*, 392 U.S. 293, 294 (1968) (citation omitted)), and poses "a serious risk that the issue of guilt or innocence may not have been reliably determined" (*id.* at 295), the Court has made clear that the admission of a co-defendant's confession in violation of *Bruton* does not invariably call for reversal. For instance, in *Harrington* v. *California*, 395 U.S. 250 (1969), the Court found harmless the receipt of two confessions made by nontestifying co-defendants because the proof of the defendant's guilt was "so overwhelming" that the error was necessarily harmless unless every constitutional error requires reversal, a proposition that the Court had squarely rejected in *Chapman*. See 395 U.S. at 254. *Schneble* v. *Florida*, 405 U.S. 427 (1972), and *Brown* v. *United States*, 411 U.S. 223 (1973), expressly reaffirmed the ruling in *Harrington*. See also *Parker* v. *Randolph*, 442 U.S. 62, 77-81 (1979) (opinion of Blackmun, J.); *Dutton* v. *Evans*, 400 U.S. 74, 91-93 (1970) (Blackmun, J., concurring); cf. *Rushen* v. *Spain*, 464 U.S. at 117-118 & n.2 (right to presence at trial). As a plurality of the Court summarized in *Parker*, "[i]n some cases, the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission so insignificant by comparison, that it is clear beyond a reasonable doubt that introduction of the admission at trial was harmless error." 442 U.S. at 70-71 (footnote omitted). *Motes* and *Harrington* thus make clear that denial of the opportunity to cross-examine an

adverse witness does not fit within the limited category of constitutional errors that must be deemed prejudicial in every case.[29]

3. There is a sound basis for this result. Whether denying a defendant the opportunity to impeach an adverse witness will affect the reliability of the fact-finding process at trial is dependent upon a host of factors, such as the nature of the testimony that the witness has given, the nature and strength of the basis for challenging his credibility, the extent of cross-examination otherwise afforded the defendant, the presence or absence of corroboration provided by the testimony of other witnesses or by physical or documentary evidence, and the defense offered at trial.[30] Showing that a witness is under indictment for an unrelated crime or is personally related to the victim may be invaluable where the case is simply a "swearing match" between the witness and the defendant; it will be of little or no benefit where the government's proof rests largely upon documentary or physical evidence or where the defense is insanity. Impeaching a witness's credibility may be devastating to the state's case

[29] Other decisions make the same point in a different but analogous context. It is firmly settled that the deliberate use of perjured testimony – a more egregious impropriety than anything that occurred here – does not require that a conviction be set aside unless "there is a[ ] reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States* v. *Agurs*, 427 U.S. 97, 103 (1976) (footnote omitted); see *United States* v. *Bagley*, slip op. 10-12, & nn.8-9; *Giglio* v. *United States*, 405 U.S. 150, 154 (1972) (quoting *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959)). This standard applies both to the introduction of perjured testimony and to the knowing failure to correct such testimony when offered by a witness (*Giglio* v. *United States*, *supra*; *Napue* v. *Illinois*, *supra*). It appears functionally equivalent to the *Chapman* harmless error standard. See *Bagley*, slip op. 10-12 & n.9. If the government's failure to disclose that a witness has committed perjury does not automatically require reversal, it logically must follow that denying the defense the opportunity to impeach a witness for bias should not automatically require reversal.

[30] See, *e.g.*, *United States* v. *Abel*, No. 83-935 (Dec. 10, 1984), slip op. 8-9; see generally *McCormick's Handbook of the Law of Evidence* § 40 (E. Cleary 2d ed. 1972) (describing various types of bias).

where that witness's testimony is the only evidence establishing an essential element of the crime, but discrediting that witness will have little effect on the jury if his testimony is cumulative of the testimony given by several other witnesses.

The government will also often have a substantial interest in keeping secret certain facts that the defense wishes to elicit on cross-examination, such as the identity of a government informant, and it is well-settled that the strength of the government's countervailing interest must be considered before disclosure can be ordered.[31] The Court has recognized, however, that there is no reason to set aside a conviction if disclosure of the sought-after information could not have contributed materially to the verdict.[32] Indeed, even where the government has no such interest in secrecy and simply fails to reveal exculpatory information requested by the defense, including material useful to impeach a witness, reversal is not required unless the sought-after information is likely to have affected the outcome of the trial.[33] It necessarily follows from these cases that it cannot rationally be presumed that the refusal to allow the defense to impeach an adverse witness with such information is so prejudicial as to call for reversal without any consideration of the weight of the state's proof or the significance to the case of the witness's testimony.

To be sure, cross-examination is the primary Confrontation Clause guarantee (see, *e.g*, *Pointer* v. *Texas*, 380 U.S. 400, 407 (1965)) and functions, in Dean Wigmore's oft-quoted phrase, as the "greatest legal engine ever invented for the discovery of truth" (5 J. Wigmore, *Evidence in Trials at Common Law* § 1367, at 32 (1974)). Impeaching a witness for bias

[31] See, *e.g.*, *Davis* v. *Alaska*, 415 U.S. at 319-321 (juvenile records privilege); *Smith* v. *Illinois*, 390 U.S: at 133-134 (White, J., concurring) (inquiries "which tend to endanger the personal safety of the witness" may be foreclosed); *Roviaro* v. *United States*, 353 U.S. 53 (1957) (informant's identity); *United States* v. *Harley*, 682 F.2d 1018, 1020-1021 (D.C. Cir. 1982) (surveillance location).

[32] See *United States* v. *Valenzuela-Bernal*, 458 U.S. at 867-871; *Rugendorf* v. *United States*, 376 U.S. 528, 534-536 (1964); *Roviaro* v. *United States*, 353 U.S. at 64-65.

[33] See *United States* v. *Bagley*, slip op. 10, 14-15; see also *California* v. *Trombetta*, No. 83-305 (June 11, 1984), slip op. 9.

is also a powerful means of discrediting his testimony. See *United States* v. *Abel*, No. 83-935 (Dec. 10, 1984), slip op. 6-9; *Davis*, 415 U.S. at 316; *Alford*, 282 U.S. at 692. Nonetheless, impeachment is simply a means to an end and is not valued for its own sake.[34] A defendant who is denied the opportunity to impeach a prosecution witness still has several other means at his disposal to convince the jury that the witness should be disbelieved,[35] and the ability to use those alternatives before the jury must be given weight under the Confrontation Clause.[36] The evidence against a defendant in a

[34] Cf. *Cronic*, slip op. 9-10 (right to counsel). That is clear from the Court's rulings that certain types of hearsay statements are so reliable that they can be admitted at trial despite the fact that the defendant has had no opportunity to cross-examine the declarant. *Ohio* v. *Roberts*, 448 U.S. at 66; see also *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) (plurality opinion); *Mattox* v. *United States*, 156 U.S. 237, 243-244 (1895); Fed. R. Evid. 803(1)-(23), 804(b)(1)-(4).

[35] There are five chief methods of attacking a witness's credibility: (1) showing a defect in his capacity to observe or remember the subject of his testimony; (2) demonstrating the witness's bias against the defendant or in favor of the government; (3) introducing prior inconsistent statements made by the witness; (4) showing that the witness's character is generally untrustworthy; and (5) proving that the substance of his testimony is false. See *McCormick's Handbook of the Law of Evidence*, *supra*, § 33, at 66. Denying a defendant the opportunity to impeach a witness for bias still allows the defendant several other alternatives. For instance, respondent was able to elicit the fact that Fleetwood was heavily intoxicated that evening, which would have certainly affected Fleetwood's ability to see respondent in Pregent's apartment (III Tr. 60).

[36] Confrontation at trial helps to assure the reliability of the factfinding process in several related ways. By requiring a witness to testify under oath, it reinforces the seriousness of the proceeding, makes lying more difficult, given the presence of the defendant, and guards against perjury through the threat of a subsequent prosecution. By permitting the accused to cross-examine a witness, it allows the defendant to challenge the witness's credibility. And by permitting the jury to assess the witness's demeanor, it provides the jury with the opportunity to determine whether the witness is credible. See *Ohio* v. *Roberts*, 448 U.S. at 63-64 & n.6; *California* v. *Green*, 399 U.S. 149, 158 (1970). The trial judge's ruling here, of course, limited respondent's opportunity to convince the jury that Fleetwood was lying. Nonetheless, because Fleetwood was on the stand and was subject to cross-examination in other respects, the purposes confrontation serves were not wholly vitiated by the trial court's ruling.

given case may also be so overwhelming or, as here, the testimony offered by a particular witness so slight, uncontroversial, or amply corroborated that an appellate court can safely say that the restriction, even if erroneous, has not denied the defendant a fair opportunity to establish his innocence. Accordingly, there is no basis for concluding that an erroneous restriction upon defense cross-examination is inherently prejudicial.

CONCLUSION

The judgment of the Supreme Court of Delaware should be reversed.

Respectfully submitted.

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